While 18 U.S.C. § 248(e) provides statutory definitions of many FACE Act terms, "threat of force" is not one of them, nor is "force" by itself. The term "force" is a legal term of art and can carry different meanings in different statutes.[26]

Under FACE, "the term 'force' is not limited to intentional acts that result in bodily injury."[27] The term is malleable, requiring no specific minimal amount of actual damage or harm inflicted. In other words, force under FACE is not necessarily "violent or assaultive force."[28] This fits in with the common law understanding of the term, in which "[m]inor uses of force may not constitute violence"[29] as violence is ordinarily understood.

While the Supreme Court has not interpreted FACE, a body of cases elucidates the general requirements of a "threat." Per one definition, a threat is "[p]ower, violence, or pressure directed against a person or thing."[30] As a carve-out of unprotected speech, threats must be construed so as to meet First Amendment requirements. Therefore, the Supreme Court has ruled that a threat must be more than "mere advocacy" of violence that does not rise to the level of "incitement,"[31] especially if it is general rather than directed towards a particular individual or group. Context and "the reaction of listeners" can distinguish a threat from constitutionally-protected speech; for instance, the Supreme Court found that a joking remark at a rally insinuating a desire to kill the president was "political hyperbole" and not a "true 'threat.'"[32] In its most recent "true threat" decision, the Court held that in the criminal context, it is insufficient merely that a reasonable person would view a statement as a threat, and intent to convey a threat was required.[33] The defendant had posted rap lyrics to Facebook that depicted "violent material about his soon-to-be ex-wife."[34] The Supreme Court has indicated it may extend that position by accepting a certiorari petition from a defendant challenging his stalking conviction on First Amendment grounds.[35] Were specific intent a required showing for a broader category of threats, more evidence would be necessary to demonstrate that statements or behavior conveyed a threat. Circuits that have considered what constitutes a "threat" have coalesced around an intent-centric definition.[36] However, most of these circuits have not analyzed the meaning of these terms within the meaning of the FACE Act specifically.

Because few circuit courts have meaningfully interpreted "force" or "threat of force" under FACE, United States v. Dinwiddie[37] has been highly influential. In that Eighth Circuit case, Regina Dinwiddie told an abortion provider, "remember Dr. Gunn…This could happen to you…He is not in the world anymore…Whoever sheds man's blood, by man his blood shall be shed."[38] The court, first considering FACE's constitutionality, referred to "force" and "threat of force" as "readily understandable terms that are used in everyday speech."[39] Analogizing to a fair housing statute that

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[26] See, e.g., Johnson v. United States, 559 U.S. 133, 139 (2010).

[27] Patel, supra note 9, at 282 (citing New York ex rel. Spitzer v. Cain, 418 F.Supp.2d 457, 473 (S.D.N.Y. 2006)).

[28] Cain, 418 F.Supp.2d at 473 (internal quotation marks omitted).

[29] United States v. Castleman, 572 U.S. 157, 165 (2014) (internal quotation marks omitted).

[30] Johnson, 559 U.S. at 139 (citing Black's Law Dictionary 717 (9th ed. 2009)).

[31] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

[32] Watts v. United States, 394 U.S. 705, 708 (1969).

[33] Elonis v. United States, 575 U.S. 723, 738–39 (2015).

[34] Id. at 727.

[35] Counterman v. Colorado, U.S., No. 22-138.

[36] United States v. Doggart, 906 F.3d 506, 510–11 (6th Cir. 2018) (compiling cases).

[37] 76 F.3d 913 (8th Cir. 1996).

[38] Id. at 917.

[39] Id. at 924.

used near-identical language, the Dinwiddie court cited approvingly to an earlier case upholding that statute because its inquiry "depend[ed] upon the totality of the evidence demonstrating the specific intent of the defendant, not upon a subjective evaluation of the terms 'intimidate' and 'interfere.'"[40] Leaning on FACE's statutory definition of "intimidate" rather than drawing a bright line over what could or could not constitute a "threat," the court concluded that even though Dinwiddie "did not specifically say . . . 'I am going to injure you,' the manner in which [she] made her statements, the context in which they were made, and [the doctor's] reaction to them all support the conclusion that the statements were 'threats of force.'"[41] Therefore, to "differentiate between true threat[s] and protected speech," the threat must be analyzed "in light of [its] entire factual context" to determine whether it could be reasonably perceived as an intent to harm.[42]

Some circuits courts use a "reasonable speaker" standard while others use "reasonable listener" standard to interpret whether speech rises to the level of a threat. The "reasonable speaker" standard asks whether the issuer of the alleged threat would reasonably foresee their statement or expression to be interpreted as one. Conversely, the "reasonable listener" standard asks whether the recipient had a reasonably-founded perception of the statement or expression as a threat. The differences between these two approaches are diminished by the fact that whichever standard courts have adopted, they have interpreted "threat of force" to be a context-specific, fact-intensive analysis that can apply to a broad swath of conduct,[43] including that which may appear facially innocuous. A threat of force under FACE may be contingent ("if you don't…someone might…"), and imminence "is not a required element," meaning that a threat could be for a vague future time.[44]

Dinwiddie and many of the FACE threat cases in its wake have involved verbal statements that either explicitly threatened violence or implied a desire to commit harm. Statements deemed threats under FACE include "[w]here is a pipe bomb when you really need one,"[45] "just because you are young does not mean your life won't be taken early,"[46] and "[y]ou need to repent because you never know how long you have."[47] Issuers of veiled threats, as the Tenth Circuit explained in United States v. Dillard,[48] "cannot escape potential liability simply by using the passive voice or couching a threat in terms of 'someone' committing an act of violence."[49]

Other cases have clarified that a "threat of force" under FACE can be more abstract than verbal statements by focusing strongly on context. "Wanted" posters and posters near an abortion clinic director's home that displayed her name, "labeled her a 'Baby Killer' and warned that [] babies' blood is on her hands" were deemed threats.[50] Similarly, the Ninth Circuit held that "WANTED" and "GUILTY" posters publicizing the names of abortion-providing physicians constituted threats given that "WANTED" posters were circulated prior to the assassinations of several abortion-

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[40] United States v. J.H.H., 22 F.3d 821, 828 (8th Cir. 1994).

[41] Dinwiddie, 76 F.3d at 925.

[106] Id. (internal quotation marks omitted).

[43] Planned Parenthood, 290 F.3d at 1074 n.7 ("The difference [between the two tests] does not appear to matter much because all consider context, including the effect…on the listener.").

[44] United States v. Dillard, 795 F.3rd 1191, 1200 (10th Cir. 2015) (citing United States v. Turner, 720 F.3d 411, 424 (2nd Cir. 2013)).

[45] United States v. McMillan, 53 F. Supp. 2d 895, 898 (S.D. Miss. 1999).

[46] United States v. Scott, 958 F. Supp. 761 (D. Conn. 1997), aff'd and remanded sub nom. United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998).

[47] Kraeger, 160 F. Supp. 2d at 375.

[48] 795 F.3d at 1191.

[49] Id. at 1201.

[50] Kraeger, 160 F. Supp. 2d at 375.

providing physicians.[51] Employing a "reasonable speaker" standard, the court held that a threat, when "the entire context and …circumstances" are taken into account, would be reasonably foreseen by the speaker to "be interpreted…as a serious expression of intent to inflict bodily harm."[52] In a post-Dinwiddie Eighth Circuit case, parking trucks in front of abortion clinic entranceways "sought to take advantage" of heightened security concerns and the aftermath of the Oklahoma City bombing, and coupled with the "manner in which [the trucks] were parked and the absence of any legitimate reason for their presence," was sufficient for clinic staff to be reasonably afraid and for a jury to find a threat had been made.[53]

In summary, FACE threat analysis considers individual facts and context, such as history between an accused FACE Act violator and plaintiff or whether the victim has been the target of abortion-related threats or violence broadly. Local and national events that do not involve either party can also be significant, such as heightened security concerns in the area due to an unrelated event[54] or oblique references to murders[55] and terror attacks.[56] So too can the "national climate of violence at reproductive health care clinics."[57]

2. "Physical obstruction."

At first blush, a "physical obstruction" might suggest a narrow, concrete type of obstacle, such as a blockade. Blockading, both via of physical barriers or crowding bodies, is a common tactic employed by antiabortion activists and can be a clear-cut FACE violation.[58] However, a closer reading reveals a broader interpretation. "Obstruction" is an "expansive" word with many definitions, but most generally refers to something that hinders or impedes "passage or progress."[59] "Physical" distinguishes the obstruction from the "emotional" or "intellectual" realm.[60] The statutory definition provided also supports a broader reading: a physical obstruction "render[s] impassable ingress to or egress from" a reproductive health provider, or "render[s] passage to or from such a facility…unreasonably difficult or hazardous."[61] Courts have interpreted "physical obstruction" to cover a wide variety of conduct, but few have defined it or the phrases within its statutory definition. While it seems like whether something is "impassable" should be straightforward to ascertain, "unreasonably difficult or hazardous" is more ambiguous. Like

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[51] Planned Parenthood, 290 F.3d at 1079.

[52] Id. at 1074–77.

[53] United States v. Hart, 212 F.3d 1067, 1072 (8th Cir. 2000).

[54] See Hart, 212 F.3d at 1072 (referring to heightened security concerns due to President Clinton visiting the city during the events at issue).

[55] Planned Parenthood, 290 F.3d at 1079.

[56] Hart, 212 F.3d at 1070 (clinic employees reminded of Oklahoma City bombing by presence of trucks).

[57] Kraeger, 160 F. Supp. 2d at 373.

[58] See, e.g., Press Release, Department of Justice, Eleven Defendants Indicted for Obstructing a Reproductive Health Services Facility in Tennessee (Oct. 5, 2022) (protesters indicted under FACE for blockading clinic and livestreaming patients).

[59] United States v. Sandlin, 575 F. Supp. 3d 16, 24 (D.D.C. 2021) (citing Oxford English Dictionary (3d ed. 2004)).

[60] Johnson, 559 U.S. at 138.

[61] 18 U.S.C. § 248(e)(4).

determining what is and is not a threat, concluding whether something is "unreasonably difficult" is "necessarily informed by context and not tied to any single metric or factor."[62]

Though no bright line rule exists, several cases make clear that "[p]hysical obstruction need not be direct."[63] "Requiring patients to navigate through . . . a chaotic scene" and "minor delays" can be sufficient to make access "unreasonably difficult."[64] Examples of physical obstructions under FACE include placing signs "so that they spanned two-thirds of the sidewalk,"[65] sitting three feet outside of an emergency exit door,[66] approaching cars in an attempt to communicate with their occupants, and "dropping an item on the ground and then retrieving it in slow motion" to delay access to a clinic parking lot.[67] However, conduct that makes accessing a clinic "unpleasant and even emotionally difficult" may not rise to the level of unreasonable difficulty.[68]

Perhaps in part because of the landscape of abortion access and legality prior to Dobbs v. Jackson Women's Health Organization,[69] in which even abortion-hostile states could not place an "undue burden" on abortion seekers[70] and had at minimum one abortion provider,[71] the existing FACE Act cases cover instances of obstructive antiabortion actors within the vicinity of abortion facilities. Therefore, courts have not yet paid much attention to the "passage" aspect of FACE's statutory definition, leaving the extent to which a provider or patient's physical path to a clinic is protected under FACE unknown. Oxford provides several potentially relevant definitions of "passage," all of which encapsulate a transition between places, a journey: "a way through something," "the action of going across, through, or past something," and "the permission to travel across a particular area of land."[72] These definitions are broad. A narrow reading might insist that "passage" only refers to the literal doorway that creates a barrier between the inside and outside of a reproductive health facility, "through" which providers and patients must ultimately enter. However, case history does not support reading "passage" so narrowly: physical obstructions in cases discussed above occurred in parking lots and even on the sidewalk beyond a clinic's property.[73]

Furthermore, reading the "passage" clause so narrowly as to only apply to entering or exiting a facility would give it a virtually identical meaning to the first clause that governs "ingress…or egress."[74] The linguistic interpretive canon of assigning a meaning to a statutory word or phrase with a presumption against an interpretation that would make it superfluous disfavors reading "passage" to mean "ingress…or egress." Proponents of a narrower reading might counter that the first clause's

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[62] New York v. Griepp, 991 F.3d 81, 105 (2nd Cir. 2021), reh'g granted and opinion vacated sub nom. People v. Griepp, 997 F.3d 1258 (2nd Cir. 2021), and on reh'g sub nom. New York by James v. Griepp, 11 F.4th 174 (2nd Cir. 2021) (opinion vacated due to disagreement on standard of review).

[63] Id. at 104.

[64] Id. at 105.

[65] Id. at 106.

[66] United States v. Mahoney, 247 F.3d 279, 283 (D.C. Cir. 2001).

[67] New York ex rel. Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 194–95 (2nd Cir. 2001).

[68] Id. at 195.

[69] 142 S. Ct. 2228 (2022).

[70] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2112–13 (2020) (reaffirming Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), as revised (June 27, 2016) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

[71] Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns, & Ushma D. Upadhyay, Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search, 20 J. MED. INTERNET RES. 4–5 (2018) (finding six states with only one abortion provider).

[72] Oxford Advanced American Dictionary (10th ed.).

[73] Griepp, 991 F.3d at 106.

[74] 18 U.S.C. § 248(e)(4).

"impassable" and the second clause's "unreasonably difficult or hazardous" are sufficiently different that a narrow reading of "passage" would not render the second clause superfluous. Instead, the noscitur a sociis canon—which prescribes avoidance of "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"[75]—suggests that "passage" should be limited by "ingress . . . or egress" in the earlier clause and therefore read as essentially interchangeable with it. However, the presumptively deliberate choice to use "passage" instead of repeating "ingress . . . or egress" in the second phrase suggests that the word is operating as a catch-all to capture obstruction that does not fit cleanly into forms of obstruction not occurring in a literal doorway. Other language in the second clause, "unreasonably difficult or hazardous," focuses more upon ultimate access to care than the first clause, which further suggests that it should be read as a catch-all to encompass a broader set of activity, for a judge or jury to decide if applicable in any given case.

Ruling out the narrowest construction of "passage" does not answer the question of where in someone's journey to a reproductive health facility FACE Act protection begins. If a pregnant woman's domestic partner intentionally obstructs her from leaving their home in order to make her late to or miss an appointment at an abortion clinic, is that a FACE violation? What about if an antiabortion activist slashes the tires of an abortion-providing physician's car to prevent them from getting to work? In both of these hypotheticals, the affected person is at the beginning of their "passage" from Point A (their domicile) to Point B (the reproductive health facility). They are in the process of carrying out a definitive plan to reach their desired location that is interrupted and obstructed by the respective instigator. A natural reading of "rendering passage…unreasonably difficult or hazardous"[76] allows for FACE to cover both of these hypotheticals. The scenarios discussed above would likely cause longer delays and constitute more intrusive interference than conduct found to be FACE Act violations in cases discussed above. It would be illogical to exclude patients and providers who have faced meaningful interference with accessing a clinic simply because the interference occurred at a different point in the process of their path to a facility. Drawing a line of a specific proximity to a clinic a patient or provider must reach to receive FACE Act protection would necessarily be an arbitrary choice and would not be supported by the statute's text. "FACE is by its own terms broad"[77] and interpretive rules demand presuming linguistic choices are deliberate. Therefore, it makes sense to interpret "passage" as encompassing the entire journey a patient or provider takes. However, "passage" could not be overbroad as to include any potential obstacle to an abortion seeker or provider attempting to reach a facility. Limiting factors might include whether the individual has taken steps to begin traveling and/or has a plan to do so in place (e.g., an appointment made at a clinic, tickets purchased or reservations made).

Despite the fact that courts have not yet addressed and answered the extent to which FACE protects a physical journey, some scholars have accepted that FACE only applies to the immediate vicinity of clinics,[78] perhaps factoring in that most FACE cases have been brought against clinic protesters. The presumption against a novel interpretation of a statute that conflicts with how it has been utilized previously[79] could be a formidable challenge to interpreting the statute to encompass

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[75] Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995).

[76] 18 U.S.C. § 248(e)(4).

[77] Griepp, 991 F.3d at 92.

[78] See, e.g., Kelly Jo Popkin, Faceing Hate: Using Hate Crime Legislation to Deter Anti-Abortion Violence and Extremism, 31 WIS. J.L. GENDER & SOC'Y 103, 104 (2016) (citing DAVID S. COHEN & KRYSTEN CONNON, LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM, 208 (2015)).

[79] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000) (holding that "actions by Congress over the past 35 years preclude[d]" a novel statutory interpretation).

conduct outside of the immediate vicinity of a reproductive healthcare facility. However, the unprecedented circumstances created by Dobbs justify reinterpretation. Reviving preexisting statutes to apply to circumstances to which they were not initially written to address is not without precedent. One need only look to the Supreme Court's decision in Bostock,[80] holding that the Civil Rights Act of 1964's prohibition of discrimination "because of…sex" encompassed discrimination based upon gay or transgender status regardless of "the limits of the drafters' imagination."[81]

C. Legislative History

The FACE Act emerged to as response to the Supreme Court's foreclosure of a legal mechanism for abortion providers to protect themselves, and in the midst of a wave of violence that threatened abortion access. The aftermath of Dobbs poses a comparable—if not more existential—threat to the ability of patients to access abortion care and the amount of providers willing and able to offer it. Therefore, if FACE's goals as set forth by its legislative history are to survive, it must be interpreted expansively.

The Senate Report begins by referencing an "interstate campaign" of violence, obstruction, and intimidation targeting "abortion-related services."[82] FACE was therefore in some sense a recognition of the unique issue of domestic terrorism directed towards abortion providers, which is ideologically driven but does not fit neatly into hate crime laws.[83]

The Senate Report also makes clear that Bray was top of mind for legislators: the statement of purpose explains that "in the Bray decision, the Court denied a remedy…to persons injured by the obstruction of access to abortion-related services" and therefore Congress found that "legislation is necessary to prohibit the obstruction of access. . . to abortion-related services."[84]

Abortion advocates argued at the time that a "nationwide shortage of trained physicians willing to provide abortions" could be attributed to the violence.[85] The legislative history suggests these concerns were well-taken, as it discusses not only preventing and punishing specific disruptive or violent acts, but ameliorating the consequences of those actions with respect to abortion access and public health. The Senate Report explains that "women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services," and that there are "increased medical risks" and detrimental effects on "public health and safety" as a result of denial of access to reproductive care.[86] Indeed, the promotion of "health and safety" is the first item listed under the statement of the statute's purpose.[87]

Along with public health, the Senate Report indicates commitment to "women's ability to exercise full enjoyment of rights secured to them."[88] One interpretation of this communicated legislative intent is that it was only meant to apply insofar as Roe remained settled law. If FACE was meant to bolster, rather than enshrine, abortion access, that leaves an open question as to FACE's place when abortion itself is no longer a right. However, the constitutional right to abortion is not the only right implicated by FACE: there is also the right to travel, and the right to enjoy

[80] Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020).
[81] Id. at 1737.
[82] S. REP. NO. 103–117, at 12. (1993).
[83] Popkin, supra note 78, at 110.
[84] S. REP. NO. 103-117, at 14–15. (1993).
[85] Figueroa & Kurth, supra note 1, at 248.
[86] S. REP. NO. 103-117, at 12–14 (1993).
[87] Id. at 15.
[88] Id. 13.

reproductive healthcare protections in haven states. Indeed, the Senate Report refers to "rights secured…by Federal and State law, both statutory and constitutional."[89]

The broader goals of the law as described by the legislative history suggest that an expansive interpretation is necessary for the spirit and purpose of the law to survive. While FACE applies generally to reproductive health facilities, the concerns about denial of access and negative consequences upon public health are specifically "abortion-related."[90] The violence and "climate of fear and intimidation"[91] under FACE's surface were occurring as a result of the ongoing abortion fight. Abortion access and preventing the health consequences caused by its denial is the reason for the statute's existence. FACE should not be interpreted, then, as protecting reproductive health services excluding abortion by virtue of Dobbs. For FACE and Dobbs to be reconciled, the statute should be construed as protecting abortion access as limited by Dobbs; while states may determine if and under what circumstances abortion is legal, FACE preserves a federal interest in abortion access and ensuring people can safely access reproductive health services to the extent that it is legal in a physical location.

III. FACE POST-DOBBS

A. Abortion Access Issues

FACE case history demonstrates courts struggling over threats that are implicit, obstruction that is indirect, and what rises to the level of "unreasonably difficult." Context-specific case-by-case inquiry will only become more complicated, and more likely to result in inconsistent decisions, with a patchwork of disparate state abortion laws. Under the current statutory framework, financial threats must involve an implied threat of force or reasonably suggest one, or else will not fall under FACE; this significant loophole would need to be resolved by an amendment, discussed in Part IV. Because exposures of privacy have previously been found to be threats under FACE, tactics like livestreaming are potentially viable FACE cases, though plaintiffs would have to demonstrate a causal link between exposure and potential harm. Physical obstruction tactics that seek to limit travel clearly violate FACE under an expansive reading, though more indirect tactics towards achieving this goal must strongly indicate such an obstructive intent if they are to fall under FACE. A broader interpretation of FACE would also allow the statute to address stalking and harassment of providers that has previously fallen through the cracks.

1. Threats.

A woman in Wisconsin, where abortion is banned, texts her ex-boyfriend that she intends to terminate her pregnancy. He responds, "you'd better not." If there is a past history of violence or abuse in their relationship, she has a good case that a reasonable person in her circumstances would interpret his statement as a threat of retaliation and thus actionable under FACE. What if there is no past abuse, but she is aware that he and his family hold strong antiabortion views and are gun-owners, causing her to fear violent retaliation? In this instance, both the statement and the surrounding context might be too general or vague for courts to find a threat of force, even under a broader interpretation of the statute. Her ex-boyfriend might insist that his statement was simply warning her that she could face criminal liability for obtaining an abortion in their state. The

[89] Id. at 13.
[90] Id. at 14.
[91] Figueroa & Kurth, supra note 1, at 248.

statement is vague enough that a jury might find his explanation as reasonable, if not more so, as hers. That outcome might be different if they had previously discussed that she was considering traveling to Illinois to obtain an abortion legally, so that he was aware that she would not be violating any laws, therefore significantly undermining his version of events. Would it be different if this scenario took place in Idaho, which has an S.B. 8-style law that imposes civil litigation? FACE only prohibits threats of force, so threats of retaliatory civil litigation would not be actionable. Given First Amendment considerations, courts may err on the side of caution and only find that a threat has been made if the implied harm is more explicit, such as with references to death or violence ("you'd better not, or you'll get hurt"). Because of the context specificity of threat analysis, some legitimate threats may slip through the cracks, especially when intent is ambiguous.

FACE can protect against litigation threats so long as they are also threats of force, but there are still significant loopholes given the mechanism by which abortion bounty laws impose liability and the range of threats they may inspire. Threats of litigation in the context of abusive relationships and/or pregnancies that are the result of rape can carry with them an implicit threat of continued or exacerbated violence. Even if a jury finds that threats of civil litigation are being exploited as a means of perpetuating an abusive relationship and therefore constitute a "threat of force," courts would find themselves in the difficult position of determining whether such a finding would "interfere with the enforcement" of civil laws.[92] Privately-enforced laws typically impose liability on abortion providers and anyone who helps an abortion seeker, not the abortion seeker herself, so if she is the recipient of the threats, she can likely bring the suit without running into FACE's own statutory limits. The situation is more complicated if the abusive partner or rapist threatens a pregnant person's friends or family. Those who "aid and abet" abortion are targeted by abortion bounty laws, but only private parties "involved in providing or obtaining reproductive healthcare services" may bring FACE Act suits.[93] This leaves a potentially significant loophole in FACE's protective ability from S.B. 8-style civil suits.

Exposure of privacy as a means of making individuals targets for providing or having abortions falls within the pattern of intimidation tactics that have been found to be FACE violations. If a "WANTED" poster distributed locally creates a risk or sufficiently suggests one to abortion providers, it stands to reason that exposing similar information to a wider online community who may then commit an act of vigilante violence does as well. Abortion providers are routinely "doxed," in which personal information such as their address is compiled and listed on a website, which puts them at increased risk of being stalked, harassed, assaulted, or even killed; whether or not such websites or posts on them explicitly advocate violence, "the dissemination of doctors' personal information through [a] public platform is itself a form of harassment that breaches doctors' privacy and may jeopardize their safety."[94]

Tactics of exposure and intimidation that harken back to the 1990s continue today,[95] suggesting that antiabortion groups still use the association between those tactics and assassination to intimidate. Nevertheless, with the WANTED posters so historically linked to high-profile murders, courts narrowly interpreting FACE may find that that unusual context does not extend

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[92] 18 U.S.C. § 248(d)(4).

[93] Patel, supra note 9, at 281.

[94] Joanne D. Rosen & Joel J. Ramirez, When doctors are "doxxed:" An analysis of information posted on an antiabortion website, 115 CONTRACEPTION 1, 3 (2022).

[95] See, e.g., Hannah Sarisohn & Elizabeth Wolfe, Anti-abortion activist charged with stalking a California doctor who provides abortions, CNN, May 20, 2022, https://perma.cc/WU2W-JHR6 (antiabortion group placed stickers reading "a killer lives in your neighborhood" on doctor's and neighbors' doors and posted flyers with link to website identifying doctor and alleging "false, inflammatory claims").

more generally to doxing and other forms of online harassment that circulate personally identifying information. However, that logic creates the grim inference that that public exposure of providers' identities and revealing information only constitutes a FACE violation once it results in one or more deaths. Similarly, while livestreaming patients or targeting them with mobile geofences may indirectly put them at risk, it may be difficult for those livestreamed to show a causal link between those acts and future harm until such harm actually occurs. With the internet as "a powerful tool for anti-abortion extremists, likely contributing to an increase since the 1990s in death and other violent threats directed against providers,"[96] it may not be long before such an event occurs. In the interim, courts should consider the full historical context of weaponized exposure against abortion providers and the "national climate"[97] around abortion in determining what constitutes a threat.

2. Physical obstruction.

Laws that create abortion bounties encourage vigilantism by deputizing private citizens as bounty hunters. Scholars and legal commentators have noted similarities between S.B. 8 and the Fugitive Slave Act[98] in terms of their legal mechanism and in that they are designed to circumvent the legal protections of one group while "harnessing the avarice and malice" of another to "stamp out" the rights of the first.[99] The Fugitive Slave Act drove "professional slave-catchers" to venture into "abolitionist strongholds" to kidnap formerly enslaved people,[100] encouraging and enabling slave patrols and militias. Abortion bounty laws may similarly inspire more aggressive vigilante tactics.

FACE defines "interfere with" as "to restrict a person's freedom of movement."[101] Efforts to prevent an individual from leaving a state clearly fall under such a restriction. Literal physical restraint is not required to prove interference under the statute.[102] Intimidation at state borders, stalking, and surveillance of patients in an effort to create a body of evidence that someone has obtained or provided an abortion across state lines can therefore fall under "physical obstruction." If a blockade makes clinic access "unreasonably difficult," depriving abortion seekers of any potential means of obtaining an abortion by foreclosing the possibility of interstate travel is "practically impossible."

Beyond interstate travel, an expansive interpretation of FACE could address some of the "targeted harassment of providers" that FACE has been criticized for failing to sufficiently address in the past, such as stalking and other activity that takes place outside of the "immediate vicinity" of

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[96] Brief for The Feminist Majority Found., et al., as Amici Curaie, p. 17, Dobbs, 142 S. Ct.

[97] Kraeger, 160 F. Supp. 2d at 373.

[98] See, e.g., Isabella Oishi, Legal Vigilantism: A Discussion of the New Wave of Abortion Restrictions and the Fugitive Slave Acts, 23 GEO. J. GENDER & L. 1, 5 (2022); see also, Michele Goodwin, The Texas Abortion Ban Is History Revisited, MS. MAG., Sept. 1, 2021, https://perma.cc/42GV-WVDJ; Aziz Huq, What Texas's abortion law has in common with the Fugitive Slave Act, WASH. POST, Nov. 1, 2021, https://perma.cc/6DX6-S7SF; Michael Hiltzik, Threats to criminalize out-of-state abortions are a scary reminder of 1850s America, L.A. TIMES, Jul. 12, 2022, https://perma.cc/S46Q-4VDX; Elie Mystal, Anti-Abortion Politicians Are Now Taking Inspiration From the Fugitive Slave Act, NATION, Mar. 11, 2022, https://perma.cc/HUU6-7WPA.

[99] Huq, supra note 98.

[100] Gautham Rao, The Federal "Posse Comitatus" Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America, 26 LAW & HIST. REV. 1, 24 (2008).

[101] 18 U.S.C. § 248(e)(2).

[102] United States v. Mahoney, 247 F.3d 279, 283–84 (D.C. Cir. 2001).

clinics.[103] If the entirety of a doctor's "passage" from home to work is protected under FACE, she can argue that safety concerns created by stalking that require her to frequently change routes and vehicles on the way to work and even move homes[104] make her journey "unreasonably difficult." While following someone from behind or picketing outside their home may not directly impede their path, this conduct is comparable to other indirect forms of FACE violations, such as presence outside of emergency exits or lingering in parking lots, that raise safety concerns and cause delays.

[103] Popkin, supra note 78, at 105.

[104] Nina Liss-Schultz, Wearing Disguises, Hiring Bodyguards, Constantly Changing Your Route Home: Just Another Day at Work at Planned Parenthood, MOTHER JONES, Dec. 4, 2015, https://perma.cc/K7S5-AHLK.

WRITING SAMPLE

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I wrote the attached paper, *Feels Bad Man: Artists' Rights When a Meme is Appropriated*, as a final paper for my Art Law class. This sample has not been edited.

Feels Bad Man: Artists' Rights When a Meme is Appropriated

Natalie Cohn-Aronoff

Introduction

In 2003, comic book artist Matt Furie published *Play Time*, an online comic drawn in Microsoft Paint, in which he debuted the character Pepe the Frog.[1] Furie subsequently released *Boy's Club* between 2006 and 2010, a comic series that "satirized and celebrated the lifestyle of 20-something bros" with an "anthropomorphic quartet of funny-animal stoners."[2] Pepe, an anthropomorphic frog with distinctive bulbous eyes and the catchphrase "feels good man,"[3] was among *Boy's Club*'s protagonists. By 2009, Pepe the Frog had pervaded online forums and social media to become a "widespread internet meme," peaking at around 2015, as celebrities shared Pepe memes and the thousands of iterations of the frog led to "rare Pepes" becoming a sort of digital collectible.[4]

The term "meme," initially defined as a "'unit of cultural transmission' that replicates and stays alive by 'leaping from brain to brain,'" has "become inextricably associated with the internet and digital life."[5] While some definitions of "meme" encompass "any viral sensation online," the more precise definition used by this essay refers to the "viral visual images continually remixed by multiple users, juxtaposed with text, or mixed with other images, that ultimately become their own shorthand for meaning."[6] Some of these images are based upon photographs, such as "Bad Luck Brian," a brace-faced teenage boy in a dated-looking yearbook photo with a bright purple backdrop, or "Overly Attached Girlfriend," a grainy image of a young woman smiling manically with her wide eyes fixed directly on the viewer. Others are drawn, such as "Trollface," a wide-mouthed figure with a toothy, crooked smirk, or "Wojak," a bald man with a furrowed brow.

Scholars have noted that many aspects of internet memes challenge underlying assumptions of copyright law, including fundamental concepts of creativity, authorship, and copying.[7] For instance, Professor Stacey M. Lantagne argues that the "authorship" inquiry to determine who has a copyright interest in a work assumes the existence of a "mastermind" who has "premeditated intent and total control," which is untrue of memes, in which "creative output" is "effectively crowd-sourced."[8] Scholars who have discussed the tension between memes and copyright generally recognize memes as a significant vehicle for creativity and online communication. Because memes do not fit easily into the existing copyright framework, and because memes necessarily build off of preexisting works and serve an important part of the communicative ecosystem, many scholars argue that to preserve the underlying ambition of copyright—to encourage creativity and the creation of new works—memes should be outside of copyright or copyright itself must be "refashioned to account for memes."[9]

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[1] *Furie v. Infowars*, 401 F. Supp. 3d 952, 956 (C.D. Cal. 2019); Giaco Furino, *Pepe the Frog's Creator Talks Making Zine History*, VICE (Aug. 3, 2016).
[2] Sean T. Collins, *The Creator of Pepe the Frog Talks About Making Comics in the Post-Meme World*, VICE (Jul. 28, 2015).
[3] *Infowars*, 401 F. Supp. 3d at 957.
[4] *Infowars,* 401 F. Supp. 3d at 958.
[5] Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 474-75 (2022) (citing RICHARD DAWKINS, THE SELFISH GENE 249 (Oxford U. Press, Inc. 2016) (1976)).
[6] Adler & Fromer, *supra* note 5, at 476.
[7] Adler & Fromer, *supra* note 5; Stacey M. Lantagne, *Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges*, 17 VA. SPORTS & ENT. L.J. 221 (2018).
[8] Lantagne, supra note 7, at 222-26.
[9] Adler & Fromer, *supra* note 5, at 448. *See also* Lee J. Matalon, *Modern Problems Require Modern Solutions: Internet Memes and Copyright*, 98 TEX. L. REV. 405, 408 (2019).

Existing scholarship on memes and their place within copyright tends to come at the issue with an underlying concern about preserving the free flow of internet meme culture, which evolves quickly and organically, and could be substantially chilled if creators were either subject to liability or forced to take the images down. This essay argues that these serious concerns should be tempered by the need to protect artists when their work spirals out of their control, and in particular when it is appropriated in a way that causes serious reputational harm to both the work and its creator.

In 2015, neo-Nazis, white supremacists, and other far-right hate groups began creating Pepe memes that conveyed their racist ideology, molding the frog to resemble ethnic stereotypes, wear white supremacist or Nazi garb, and to crudely express support for then-presidential candidate Donald Trump.[10] Pepe transcended the internet and became a flashpoint during the run-up to the 2016 election, as Trump and members of his family and campaign courted their alt-right followers by sharing Pepe memes, while Hillary Clinton denounced Pepe as a "sinister" white supremacist symbol.[11] Pepe the Frog was ultimately classified as a hate symbol by the Anti-Defamation League.[12] Furie has struggled to distance his work and reputation from the fascist appropriation of Pepe, including by launching an online "save Pepe" campaign, "killing off" the character, and ultimately pursuing legal action.[13] While Furie's experience having his work become a meme is unusual in its pervasive association with a singular group, the increasing number and popularity of niche digital spaces for communication and socialization suggests that Furie will not be the last artist whose work is memeified and then coopted by a group or used to convey a message of which the artist disapproves and which could seriously damage their reputation.

In many cases, "memeification" can be both socially beneficial, by inspiring millions to reinterpret or riff off of the original work, and financially beneficial for the author, who can profit off of their virality, through official merchandise, licensing, or renewed attention to the original work.[14] However, artists whose work spurs memes can find it difficult to assert control over their work. Since works often become memes without the consent or intent of the original author, leaving works unprotected by virtue of being memeified would "incentivize content creators to closely guard all content posted to the Internet" out of fear that they may inadvertently relinquish their rights.[15] Part I of this essay argues that while most memes are sufficiently transformative such that they can be considered a fair use, when use of a work causes reputational harm to the original work and its author such that the market for either could be affected, a fair use inquiry should tip strongly in the artist's favor. Part II discusses other affirmative defenses artists might face and argues that abandonment and implied license doctrine as applied to copyright should permit artists to selectively assert infringement claims without being forced to forfeit the rights to their work or assert them universally. Part III discusses two alternative mechanisms by which artists might assert their rights when their work is appropriated for or by harmful means, by pursuing legal action against the online sites that foment or permit such harmful uses or through an amended Visual Artists Rights Act that protects more than fine art.

I. INTERNET MEMES AND COPYRIGHT

A. Inherent copyrightability of memes

[10] Jesse Singal, *How Internet Trolls Won the 2016 Presidential Election*, N.Y. MAG. (Sept. 16, 2016).
[11] Adam Serwer, *It's Not Easy Being Meme*, ATLANTIC (Sept. 13, 2016).
[12] Jessica Roy, *How 'Pepe the Frog' went from harmless to hate symbol,* L.A. TIMES (Oct. 11, 2016).
[13] Susan Decker, *White supremacists' use of Pepe the Frog fought by its creator*, FLA. TIMES-UNION (Sept. 19, 2017).
[14] Adler & Fromer, *supra* note 5, at 513.
[15] Cathay Y. N. Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 GEO. L.J. ONLINE 142, 160 (2021).

As original works of authorship, captured by photographers or conceived by artists, most underlying works that become memes presumptively have some form of copyright protection. Even a roughly-sketched face or straightforward photograph has some protected elements, depending on the extent of its originality. A photograph might possess originality because of its "rendition or timing" or because of the "creation of the subject" or scene.[16] Even a work with limited originality—one that could be largely recreated by another artist without infringement—is protected from direct copying. Copying can be proven by showing that the infringing author had access to the work and that the two works are substantially similar; the fact that a work has become a viral meme itself suggests access, and memes that are mere reposts of an image with a new caption can be clearly identical.[17] Substantial similarity can be harder to prove in other memes like Pepe or Wojak, which remix the image itself as opposed to just captioning the unedited work; these memes take the original subject of the underlying work and imagine them with different emotions or scenarios. These works are probably better understood as derivatives;[18] they still must bear substantial similarity to the work upon which they are based to achieve recognition as a meme. For instance, derivative Pepes typically use his strikingly bright color scheme, distinctive visual design of prominent lips and bulbous eyes, and riffs on his name or catchphrase.

Some scholars argue that memeification changes the authorship inquiry, and that memes are better characterized as "derivative of the original *meme*" as opposed to the original underlying work.[19] This distinction makes some sense where the expression of the meme is markedly different than the expression of the original work, such as Bad Luck Brian, in which a photo only intended to be a professional headshot of its subject for use in a high school yearbook was transformed into a symbol of the misfortune and awkwardness of a certain kind of teenage boyhood experience. However, this would put judges in a difficult position of trying to untangle the expressive intent behind different works, and create additional fact-finding challenges of trying to identify the author of the work who transformed the original into its initial, purportedly legally distinct meme version. Judges resist arguments that would require them to be art critics or experts,[20] and perhaps for this reason, the few courts that have considered copyright infringement in memes thus far have fit both the underlying work and the meme into existing copyright framework.

Because the internet and internet meme culture is so new, taking off in just the past decade, there are only a "mere handful" of copyright cases over memes.[21] Most of these cases do not challenge all or a large number of potentially infringing uses of the image, but those that are explicitly commercial. For instance, the artists behind the "Keyboard Cat" and "Nyan Cat" memes sued Warner Brothers Entertainment for using their work in the video game "Scribblenauts"[22] (they ultimately settled out of court).[23] Other artists have sued when their work was utilized to promote a particular message: the photographer of "Success Kid" sued Iowa politician Steve King for copyright infringement after he utilized the meme for fundraising purposes,[24] objecting to the

[16] *Griner v. King*, 568 F. Supp. 3d 978 (N.D. Iowa 2021).
[17] *Griner*, 568 F. Supp. 3d at 993-95.
[18] 17 U.S.C. § 106(2).
[19] Lantagne, *supra* note 7, at 236-37. *See also*, Terrica Carrington, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age,* 7 GEO. MASON J. INT'L COM. L. 139, 158 (2016).
[20] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).
[21] Adler & Fromer, *supra* note 5, at 492.
[22] Complaint, *Schmidt v. Warner Bros. Ent.*, No. CV13-02824-JFW, 2013 WL 1728009 (C.D. Cal. Apr. 22, 2013).
[23] Katie Van Syckle, *Keyboard Cat and Nyan Cat Come Out Ahead in Lawsuit Against Warner Bros.*, N.Y. MAG. (Sept. 26, 2013).
[24] *Griner*, 568 F. Supp. 3d at 995-96.

potential implication of support or perceived association between the work and King's "bigotry" and "extremist views."[25] Copyright holders trying to invoke their public display rights to limit general use of their work in the creation of memes is less common, but has occurred. Getty Images "'pursued and settled' multiple infringement cases" involving a photograph of a clumsy penguin originally captured by a photojournalist for *National Geographic*, now widely known on the internet as "Socially Awkward Penguin."[26] Notably, media giant Getty has more resources to pursue these claims at the scale necessary to address widespread use of viral meme than an individual artist, and can afford to pressure settlements even against alleged infringers who have a compelling fair use defense.[27]

B. Are memes fair use?

The fair use defense for copyright infringement is a four-part inquiry that considers 1) the "purpose and character" of the secondary work's use, sometimes referred to as its "transformativeness"; 2) the "nature" of the original work; 3) the amount and substantiality of the original work utilized in the secondary work; and 4) the effect of the use on the potential market for the original work.[28] Fair use is an escape valve for works that would otherwise be infringing, recognizing that art necessarily is inspired by and builds upon preexisting works; the foreclosure of this kind of use, even in works that create something new, would not further the aims of the copyright system.

Many scholars have argued that, even if a copyrighted work is copied in the creation of a meme, the meme likely falls under fair use,[29] perhaps even when used for the explicitly commercial purpose of marketing.[30] This is because memes, even if they use a substantial amount or the entirety of an underlying work, typically have a strong case that they are transformative. By recasting, re-contextualizing, or reinterpreting, memes strike at the heart of expressiveness that the fair use defense is intended to protect. The line between transformation and derivative work is not an easy one to draw, however, as a case currently before the Supreme Court—considering whether an Andy Warhol pop art silkscreen of a portrait photograph is sufficiently transformative, or if that is even the right question—makes clear.[31] Even scholars who generally agree that memes fall under fair use disagree on specifics. Professor Lantagne, for instance, argues that memes that are "mere reproductions" should be distinguished from those that "mutate," in which the visual image and its meaning evolve and change as the meme develops, with the former less protected than the latter.[32] It is also worth noting that parsing out commercial from noncommercial uses, already difficult to determine under current copyright doctrine,[33] is even more difficult in the "meme economy," in which meme makers typically "tend to profit only indirectly" such as through ad sponsorships or employment opportunities for brands seeking to go viral.[34]

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[25] Alan Yuhas, *Mother of 'Success Kid' Demands Steve King Stop Using His Meme*, N.Y. TIMES (Jan. 28, 2020).
[26] Caitlin Dewey, *How copyright is killing your favorite memes*, WASH. POST (Sept. 8, 2015).
[27] *Id.*
[28] 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 575-78 (1994) (holding that commercial use does not make a use presumptively unfair).
[29] *See, e.g.*, Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 252-55 (2013); Lea Silverman, *Don't Sue Meme, It's A Parody*, B.C. INTELL. PROP. & TECH. F. 1, 10 (2020).
[30] Carrington, *supra* note 19, at 158.
[31] *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 39 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).
[32] Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 390-92 (2018).
[33] *Harper & Row, Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 562 (1985).
[34] Adler & Fromer, *supra* note 5, at 512-14.

While many articles persuasively argue that the transformative property of memes with respect to underlying artwork such that the first factor tips the scales heavily towards fair use, and some have even cited Pepe the Frog as an example of how much a meme can transform, few substantively analyze Furie's predicament from the fourth factor of the fair use analysis. While Furie's cases did not come down to fair use, perhaps because of the explicitly commercial use of the infringing works, the fourth fair use factor tips strongly in his favor. The appropriation of Furie's work in the service of hate groups did more than oversaturate the market for licensing Pepe, as a plaintiff's fourth-factor argument against fair use typically goes; the reputational harm might extend beyond the specific work to the artist himself, foreclosing potential professional opportunities. Even if potential galleries or publishers know that Furie himself does not espouse such views, they may not want to take a risk on displaying or publishing his work, thereby exposing themselves to the tainted association; patrons might recognize Furie's artistic style and make the connection to Pepe, but only know of Pepe as a hate symbol. While considering the market for the artist in general goes beyond the market for the original work, the two issues are arguably intertwined; for instance, the artist may have a distinctive and recognizable technique, style, and/or subject matter that extends from the work at issue to the rest of their oeuvre. Furthermore, it would seem that an infringement that is able to damage not only the market for the work but also the artist entirely is especially troubling and suggestive that the harms caused by the use of a work are unfair to the artist.

The counterargument is that a transformative work that harms demand for a work can still be fair use; a parody is still protected even if its critical take on the work eclipses the market for the original.[35] The Supreme Court in *Campbell v. Acuff-Rose Music* distinguished this type of harm, which is not "a harm cognizable under the Copyright Act," from harm of secondary works that are effectively substitutes or a "market replacement" for the original or derivatives of it.[36] The concern about extending protection to biting and effective criticism and commentary through parody is distinguishable from reputational harms, however, because the use of the work is not commenting upon or criticizing the original, it is misleading others into associating the work with messages, ideas, groups, and individuals that have nothing to do with the work or artist. Individuals using Pepe to create white supremacist memes are not doing so to comment on *Boy's Club* or Pepe, they are appropriating it and utilizing it to achieve unrelated ends, and simply disregarding the effect upon Furie's work. Notably, parody is limited to works in which a viewer would recognize the underlying work being parodied because there is "public awareness of the original work."[37] An offensive parody of Mona Lisa, even if adopted by white supremacists, is unlikely to be attributed to Leonardo da Vinci, whereas memes often sprout from obscure works, and the meme itself is what is likely to be recognized by the public. An obscure work that is misappropriated is probably more likely to be associated with or attributed to the original author, about whom the general public knows nothing. Therefore, the kind of harm caused by successful parody, which does not extend to potential misattribution, is not dichotomous with the reputational harm of an appropriated memeification.

II. Barriers to Asserting Copyright over Memes

Alex Jones, the defendant in Furie's case against *Infowars*, introduced two theories—abandonment and implicit license—to argue that Furie's ambivalent public statements about Pepe's virality and failure to take legal action while his copyrighted work circulated across the internet

[35] *Campbell*, 510 U.S. at 592.
[36] *Id.* at 591-93.
[37] *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

without his permission foreclosed his ability to assert his rights.[38] The court allowed the abandonment defense to proceed, but rejected the implicit license argument,[39] suggesting "that it will be difficult, though sometimes possible, to prove abandonment or implied license" of a work that has become a meme.[40] The limited ruling on a summary judgment motion does not resolve what could be a formidable obstacle to artists if they initially do not resist the memeification of their work, but later find it appropriated undesirably. An all-or-nothing approach to copyright enforcement would be impracticable for artists and undesirable for meme creators and culture, for all of the reasons discussed above that some scholars believe justifies removing memes from the copyright system. Instead, artists should be allowed to selectively enforce their rights without risking losing them to abandonment or implicit license defenses.

A copyright holder only abandons their copyright interest by an "overt act which manifests his purpose to surrender his rights in the work and to allow the public to copy it."[41] Abandonment defenses are uncommon, and what constitutes an "overt act" is ambiguous, though it is understood to be a high bar; "negligen[ce] in protecting the copyright"[42] or a "lack of action" is not enough.[43] Nevertheless, an artist's public statements might be used against them,[44] such as the kind of public statements elicited by the press after an artist's work goes viral or becomes a meme. Infowars' primary evidence of Furie's alleged abandonment was a number of interviews he had given about his work becoming a meme that suggested acceptance, or perhaps resignation, of Pepe's memeification.[45] If ambivalence towards the public generally utilizing the work in a meme is a sufficiently "overt act" to prove abandonment, an artist's ability to take advantage of their work going viral is severely limited, pressuring them to either stay silent or to forcibly assert their rights, a decision which may foster ill will towards the artist and work in the eyes of the public. Consent to one use, therefore, should not mean abandonment with respect to all uses. This might require a nuanced understanding of abandonment doctrine that recognizes that intellectual property, unlike chattel, can be partially but not entirely abandoned.[46] Complicating copyright abandonment doctrine by distinguishing between uses is justified by the fact that the stakes are high: an abandonment finding places a copyrighted work in the public domain, and once it "is dedicated to the public domain, it can never be privately owned again."[47]

Circuits approach implied copyright licenses differently; most approach the issue with some combination of multifactor tests[48] and analysis of the conduct or other circumstances specific to the case.[49] A finding of "consent for an implied license" can "take the form of permission or lack of objection" and, particularly in totality-of-the-circumstances circuits, need not take the form a work-for-hire arrangement,[50] although some form of a preexisting relationship or "offer and acceptance"

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[38] *Infowars*, 401 F. Supp. 3d at 968-69.
[39] *Id.*
[40] Adler & Fromer, *supra* note 5, at 538.
[41] *Nat'l Comics Publ'n v. Fawcett Publications*, 191 F.2d 594, 598 (2d Cir. 1951), *supplemented sub nom. Nat'l Comics Publications v. Fawcett Publications*, 198 F.2d 927 (2d Cir. 1952); *see also, Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 898 (5th Cir. 1972).
[42] *Fawcett*, 191 F.2d at 598.
[43] *Hampton,* 279 F.2d at 104.
[44] *Infowars*, 401 F. Supp. 3d at 965. *See also*, *Melchizedek v. Holt*, 792 F. Supp. 2d 1042, 1048 (D. Ariz. 2011) (finding that a jury might reasonably find the statement "I don't care about copyrights or any of that stuff" evinced abandonment).
[45] *Infowars*, 401 F. Supp. 3d at 965-66.
[46] Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 493 (2020).
[47] Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 391 (2010).
[48] *See, e.g.*, *Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755, 762 (7th Cir. 2016).
[49] *See, e.g.*, *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).
[50] *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 500-501 (5th Cir. 2012).

may be a precondition to an implied license.[51] A "general intent" offered by way of a public statement is less likely to "invite the performance of a specific act" necessary to suggest an offer.[52] For this reason, implied license defenses likely pose a less formidable barrier than abandonment to artists who seek to hold some, but not all, infringers liable, and have made public statements assenting to some uses of their work. However, the implied license should still be seen as "murkily available on the right set of facts"[53] and therefore still a potential concern for artists seeking to assert their rights against a misappropriation of their work.

Scholars have raised concerns that "surgical selective enforcement" of copyright "raises free speech concerns not usually present in copyright law," arguing that "preventing another from speaking" because their views are "unpalatable" is inconsistent with First Amendment values.[54] However, the First Amendment permits favoring or disfavoring viewpoints in some circumstances, for instance, if the speech is categorized as government speech as opposed to private speech because the government is subsidizing the speaker.[55] Furie's work being misappropriated also can be thought of as analogous to libel doctrine, under which the First Amendment permits individuals protection against false statements made about them.[56] The underlying concern about reputational harm and a private individual's difficulty in refuting the harm is consistent between libel and selective copyright enforcement of the sort discussed in this essay, which suggests that permissiveness of selective copyright enforcement would not necessarily be in tension with the First Amendment.

III. Alternative Mechanisms of Asserting Artists' Rights

A. Liability of websites

Going after every single unlawful use of Pepe that is in the service of racist, anti-Semitic, or otherwise inflammatory messages would be, practically speaking, impossible. Furie has strategically pursued infringement claims against individuals who have used his work for explicit commercial gain.[57] Such cases are more easily winnable for him than those that are merely posted online for social clout or communication in certain niche online communities, and his victories might send a signal that he will aggressively pursue his work being appropriated in such a way and discourage continued or future such uses. However, a potentially more efficient and effective means of disentangling his work from its appropriators would be to go after the online forums and websites upon which the objectionable memes are adopted and contorted, and advocacy of hateful messaging through memes is permitted and implicitly encouraged. An artist could go after such a website either under a third-party liability theory or by arguing that the site is directly infringing.

The misappropriation of Pepe started on a message board on the website 4chan.[58] Because of the "anonymity and impunity" afforded to 4chan users in contrast to other social media sites, 4chan is used by incels and other disaffected groups who utilize the vast communicative capacity of the internet to foment hatred, though has also been used for other political ends, including by the

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[51] *Infowars*, 401 F. Supp. 3d at 968 (citing *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1050–51 (9th Cir. 2015)).
[52] *Id.* at 968-69.
[53] Adler & Fromer, *supra* note 5, at 538.
[54] Adler & Fromer, *supra* note 5, at 542.
[55] *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that preventing federally-funded doctors from counseling abortion and compelling counseling on abortion alternatives was government speech).
[56] *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).
[57] Decker, *supra* note 13.
[58] Roy, *supra* note 12.

hacktivist group Anonymous.[59] Ironic uses of offensive language and calls for "uprisings" are often difficult to disentangle from true threats like the incitement of the Umpqua Community College shooter in 2015.[60] As an image-driven site in which users post, react, and communicate using images they freely upload, 4chan is rife with potential copyright infringement. The structure of 4chan—which limits the availability of posts because boards are cut off at ten pages—allowed it to escape legal pressure for a long time, as images disappear before the rights holder has an opportunity to realize the infringement had occurred.[61] However, the site came under increased scrutiny after it became a hub to host and share stolen nude photographs of Hollywood actresses, whose lawyers threatened legal action.[62] After long ignoring the issue, 4chan finally introduced a policy to comply with the Digital Millennium Copyright Act (DMCA) in 2014.[63] Despite this, 4chan's structure of "rapid expiration" of posts that are then sucked into an "inaccessible Internet black hole" did not change, however; the site's DMCA compliance efforts were summed up as "pretend,"[64] "completely useless" and "a joke."[65] Though 4chan is widely understood as having structured itself to evade liability while continuing to permit the posting of infringing content that can be "shared and sent out to the far corners of the Internet" before it disappears,[66] the site was not challenged by the affected actresses nor has any other copyright holder challenged it thus far.

One reason for this might be that pursuing third-party liability for copyright infringement is no easy feat. Case history on third-party copyright liability has primarily involved technological advancements that allegedly facilitate copyright infringement, from VCRs that allow home-taping of copyrighted content[67] to capturing television signals to livestream on the internet.[68] Those landmark cases specifically dealt with exact copying and display rights, not derivative rights, although the bigger hurdle of applying third-party liability doctrine is that websites likely will not be viewed as an analogous form of technology that facilitates access. 4chan has no role in content curation or moderation, and it does not make images accessible to users that otherwise would not be. A plaintiff would have to argue that the unmitigated ability to upload content in concert with the expiration trigger is a system is designed to evade copyright protection, which the court should reject under its reasoning in *Aereo*, which suggested a finding of infringement because the technology had the substantive effect of evading copyright protection even if its form was an attempt at literal compliance.[69] Even if 4chan were sufficiently analogous to an access-facilitating device to fall under third-party liability doctrine, the site need only prove a "substantial noninfringing use" to survive such a challenge.[70] 4chan likely has a number of arguments at its disposal to justify both its free user upload policy and its post expiration, including usability and preventing post clutter from hindering user experience, functionality and not having to use bandwidth to store excess data, and, perhaps most persuasively, the fact that post expiration encourages users to express themselves more freely as they know that their statements are unlikely to be traceable or create a permanent record as

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[59] Emma Grey Ellis, *4Chan Is Turning 15—And Remains the Internet's Teenager*, WIRED (Jun. 1, 2018).
[60] Mary Elizabeth Williams, *"The Beta Rebellion has begun": 4chan warnings about more school shootings aren't "satire" — they're sick*, SALON (Oct. 15, 2015).
[61] Alex Hern, *4chan website introduces copyright mechanism after celebrity hacking*, GUARDIAN (Sept. 4, 2014).
[62] *Id.*
[63] *Id.*
[64] Lauren Walker, *Celebrity Nude Leakers 4chan Pretend to Get Serious About Copyrights*, NEWSWEEK (Sept. 4, 2014).
[65] Dell Cameron, *4chan's copyright-violation policy is a joke*, DAILY DOT (Sept. 3, 2014).
[66] Walker, *supra* note 64.
[67] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442-43 (1984).
[68] *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014).
[69] *Aereo*, 573 U.S. at 446-48.
[70] *Sony*, 464 U.S. at 442.

posting on most parts of the internet does. Expiration might also encourage site engagement, as users may log on frequently to ensure they are not missing out on discussions that disappear shortly.

Artists might have a better chance of holding sites like 4chan liable as direct infringers, following a pattern of other cases brought by rights holders against websites that invite and are built upon user-uploaded content.[71] However, a plaintiff must prove "volitional conduct," which is presumptive if the "program [is] designed to infringe copyrighted material and select[] the copyrighted material that it copies," but is much more difficult to show when it "plays no role" in image selection.[72] However, volitional conduct may also be shown in other ways, such as if the site creates "further copies that the user did not request."[73] Without knowing more about the precise software mechanisms by which 4chan operates, it is hard to say if it fits neatly into any of the existing theories of volitional conduct. At least one scholar has argued that 4chan does "materially contribute" to copyright infringement, suggesting that 4chan's emphasis on user anonymity and refusal to archive evinces volitional conduct.[74] Given the widespread understanding that 4chan enables copyright infringement,[75] it is certainly a promising avenue worth pursuing for an artist whose work is being circulated on the site or sites like it. Of course, an artist would have to establish that the memes or images circulating on the site are in fact infringing, revisiting the issues discussed in Part I. The potential downside of this strategy is that it carries with it many of the drawbacks to the all-or-nothing approach discussed in Part II; this legal strategy, if successful, might shut 4chan down. While shutting down certain 4chan message boards, such as those actively utilizing appropriated work to foment hate and promote massacres, might be desirable, it would also have the effect of suppressing lawful and socially valuable speech as well.

B. Visual Artists Rights Act

The Visual Artists Rights Act (VARA) goes beyond general rights associated with copyright to afford "additional and independent protections to authors of works of visual art" associated with "moral rights," which most notably includes "attribution and integrity."[76] Among other rights, VARA gives artists a cause of action to "prevent any intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to [the artist's] honor or reputation."[77] This would map neatly onto Furie's predicament; surely the reputational harms discussed heretofore apply such that the alt-right memes qualify as distortions of the work that are "prejudicial" to his "reputation." There is just one catch: VARA's definition of visual artists is limited to certain kinds of visual works that are in a "single copy" or "a limited edition of 200 copies or fewer."[78] While the definition does not specifically state that VARA only applies to fine art, the lists of what is and is not covered under VARA suggest that the statute is primarily intended for artists and artworks of stature. VARA's text technically only limits one of the rights it creates to "work[s] of recognized stature,"[79] which perhaps suggests that the rest of the statute should be read to cover a broader category of works. In practice, however, the few cases that explore VARA's limits largely involve

[71] *See, e.g., BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42 (2d Cir. 2019).
[72] *Polyvore*, 922 F.3d at 49-51.
[73] *Id.* at 51.
[74] Winhkong Hua, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 FORDHAM URB. L.J. 1217, 1235 (2017) (discussing theories of website liability in the context of revenge pornography).
[75] Walker, *supra* note 64; Cameron, *supra* note 65.
[76] *Massachusetts Museum Of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 49-50 (1st Cir. 2010).
[77] 17 U.S.C. § 106A(3)(A).
[78] 17 U.S.C. § 101.
[79] 17 U.S.C. § 106A(3)(B).

disputes between recognized artists involved in disputes with property owners in possession of a fixed sculpture or installation, in which the right asserted by the artist is against destruction or movement of the artwork that might damage it.[80]

The distinctions drawn between what is and is not a "work of visual art" under VARA can feel arbitrary, especially as the means by which artists create and make money off of art diversify, and the art industry itself changes with new technology like NFTs. Why should talented professional artists who earn a living off of their art, but do so by selling prints on Etsy instead of selling their work through a gallery, not be entitled to VARA rights? The law makes a judgment call about the importance of protecting only certain art and artworks, though those artists may be the least in need of VARA's protection. If a Jeff Koons work was at risk of destruction, the value of his work is such that a buyer would likely be able to purchase it and save it from destruction; because of his celebrity within the art world, Koons has access to media channels and can refute any uses of his work that would damage his reputation. VARA already makes some distinctions between categories of art and artists, and could bolster protections of reputational harms for lesser-known digital artists like Furie while retaining a higher barrier for protection against destruction if there is less concern about the destruction of obscure works or concern about inviting a flood of litigation.

Conclusion

The modern internet and meme culture offer new opportunities for art to be shared, created, discussed, mocked, and celebrated. As works take on a life of their own on the internet, an author can get out their name and work and maybe even profit off their work in an unexpected way. However, with that loss of control, the author is at risk of their work being twisted into something unrecognizable that irrevocably changes the course of their career. An artist in this position should be afforded leeway to regain control. The copyright system, as it is continuously evolves and changes in the digital age, should try to encourage as much freedom and fair use of works on the internet as possible, while leaving ample avenues for artists to reclaim and reassert their rights when that freedom is abused.

[80] *See generally*, *Buchel*, 593 F.3d 38; *Carter v. Helmsley-Spear, Inc.,* 71 F.3d 77 (2d Cir. 1995); *Kelley v. Chicago Park Dist*., 635 F.3d 290 (7th Cir. 2011).

Applicant Details

First Name	**Trevor**
Last Name	**Colliton**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**(212) 845-9393**

Applicant Education

BA/BS From	**City University of New York-Graduate School & University Center**
Date of BA/BS	**September 2018**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**CUNY Law Journal** **CUNY Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**CUNY Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

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2018-20 supervisor at Achievement First Brooklyn High School

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2021-22 Contracts professor, and I was her 2022-23 Contracts teaching

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III.
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Spring 2023 Economic Justice Project Clinic supervisor & professor
This applicant has certified that all data entered in this profile and any application documents are true and correct.

July 21, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

Of public-service law students nationally, I am the premier clerk prospect. At the #1 public-service law school, I am a law journal editor-in-chief, moot court president, and ACS president. I interned with Detroit's AUSAs, New York State's Senior Associate Judge, and two clinics. And as a high school teacher and college debater, I earned top-three national accomplishments.

I would appreciate your 2024-25 clerkship the most of any applicant because I work the hardest at public-service lawyering, reasoning, and judgment. Few other candidates endured hells like living with a molester until age seven and running away for years. And I welcomed even more challenges by picking principled paths over common shortcuts. Yet I am the applicant with nationally exceptional results in three argumentative arenas—law school, teaching, and debating.

I have some of the strongest possible credentials for a public-service law student. Many aspiring attorneys attend a law school in the "highest tier" they can. And few clerkship applicants would decline the final-editing role on their school's existing law review. But I applied to only CUNY Law because it has 1.8x the rate of public-service law students as the second-place ABA school. And I am exerting thrice the effort to help create a more comprehensive and less theoretical law journal. My classmates made me nationally rare in heading three student groups that mold clerks—a law journal, moot court, and law & policy society.

Few educators nationally rivaled my ability to refine reasoning. Former college debaters tend to train the most privileged high schoolers. But I taught speech & debate at an 11,000th-ranked public school in reading and math. And we suffered discrimination as the nation's only top-300 speech & debate team from a school with over 70% Black or 98% Black and Latinx students. Yet we earned the second-best performance-per-student among U.S. public schools and improved the most spots in the national standings among all schools with under 1400 students.

In a debate league with Columbia, Harvard, Princeton, Stanford, UVA, and Yale, I had one of the best reputations for rigorous and impartial judgment. I faced immense bias because only I often recruited and partnered with community college students of color. And I put integrity first—my league honored me for helping novices, refusing to win on technicalities, and radiating positivity. Yet I became one of three chief judges for the world's second-most competitive debate event.

I will work to become a great clerk too. You may contact me at (212) 845-9393 and trevor.colliton@live.law.cuny.edu.

Respectfully,
Trevor Colliton

TREVOR COLLITON
trevor.colliton@live.law.cuny.edu | (212) 845-9393

New York Court of Appeals, Senior Associate Judge Jenny Rivera
Judicial Intern (Summer 2023)

U.S. Attorney's Office for the Eastern District of Michigan, Detroit
Legal Intern (Summer 2022)

City University of New York School of Law
J.D. Candidate (2024)
- Editor-in-Chief and Founder - *CUNY Law Journal* (2023-24)
- President - CUNY Moot Court (2023-24)
- President - CUNY American Constitution Society (2022-24)
- Student Attorney - Immigrant & Non-Citizen Rights Clinic (2023-24)
- Student Attorney - Economic Justice Project Clinic (Spring 2023)
- Contracts Teaching Assistant - Professor Deborah Zalesne (2022-23)
- Staff Editor - *CUNY Law Review* (Fall 2022)

Achievement First Brooklyn High School
Speech & Debate Teacher (2018-20); Speech & Debate Coach (2018-22)
- #1 gain in National Speech & Debate Association rankings among all U.S. schools with under 1400 students (2019-20)
- #2 in NSDA performance-per-student among U.S. public schools (2019-20)
- Only top-300 team in NSDA rankings from a school with over 70% Black or 98% Black and Latinx students (2019-20)

CUNY Baccalaureate for Unique & Interdisciplinary Studies
B.A., Ethics in Literature (2018)
- Chief Adjudicator - North American Debating Championship (2019)
  - One of three chief judges for world's second-most competitive debate event
- President and Founder - CUNY Debate Society (2014-18)
  - Started and led group representing most linguistically diverse and largest student population of any university debate team globally
- Kyle Bean Award - American Parliamentary Debate Association (2018)
  - One of two who best embodied qualities of former Harvard debater Kyle Bean: welcoming new debaters, exploring interesting topics, making debate fun for all

Law Student Copy Academic Record

Name: Trevor Colliton
Student ID: 15148451

Birthdate: 04/15
Student Address: 8723 57th Ave Apt 2F
Elmhurst, NY 11373-5267
Print Date: 06/07/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/09/2021: Active in Program
06/09/2021: Law JD Major

---------- **Beginning of Law Record** ----------

2021 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	A-
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	B
Contact Hours:	2.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Fall Term

Course	Description	Earn	Grd
LAW 7192	Constitutional Structures	3.00	A-
Contact Hours:	3.00		
LAW 7251	Public Institutions/Admin Law	3.00	A
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7292	Evidence-L&Pub Int 1	4.00	B+
Contact Hours:	4.00		
LAW 7531	New York Practice	4.00	A
Contact Hours:	4.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 738	Professional Responsibility	2.00	A
Contact Hours:	2.00		
LAW 798	Public Benefits	3.00	A
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	B+
Course Topic:	ECON JUSTICE PROJECT		
Contact Hours:	4.00		
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
Course Attributes:	Low Textbook Cost		
LAW 77214	Moot Court	2.00	CR
Contact Hours:	2.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

2023 Fall Term

Course	Description	Earn	Grd
LAW 739	Voting Rights		
Contact Hours:	3.00		
LAW 808	Land Use & Community Lawyering		
Contact Hours:	2.00		
LAW 810	Immig & Non-Citizen Rts Clinic		
Contact Hours:	8.00		
LAW 7726	Topics In Law		
Course Topic:	Approaches to Discrimination		
Contact Hours:	3.00		

End of Law Student Copy Academic Record

Name: **Trevor Colliton**
Student ID: **15148451**

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 09/01/2018

Academic Program History

Program: Undergraduate
05/30/2017: Active in Program
CUNY Baccalaureate BA Major
Home College: New York City College of Technology.
Area of Concentration: Ethics in Literature.
Mentor: Prof Kapstein,English,John Jay College.

---------- **Beginning of Undergraduate Record** ----------

2017 Spring Term

Course	Description	Earn	Grd
GOV 2401	US Constitutional Law	3.00	A
Contact Hours:	3.00		
Instructor:	Marco Castillo		
LAW 1101	Intro to Paralegal Studies	3.00	A
Contact Hours:	3.00		
Instructor:	Sara Schechter		
LAW 1103	Civil Law and Procedure	3.00	A-
Contact Hours:	3.00		
Instructor:	Charles Coleman		
LAW 4702	Bankruptcy	3.00	A
Contact Hours:	3.00		
Instructor:	Edward Vaisman		

2017 Fall Term

Course	Description	Earn	Grd
ENG 2200	American Literature I	3.00	A
Contact Hours:	3.00		
Instructor:	Archie Porter		
LAW 1201	Legal Research	3.00	A
Contact Hours:	3.00		
Instructor:	Gail Williams		

2018 Spring Term
Hunter College

Course		Description	Attempt	Earn	Grd
COMPL	32049	Narrat Adultery XIX Cent Lit	3.00	3.00	A-

2018 Spring Term
John Jay College of Criminal Justice

Course		Description	Attempt	Earn	Grd
LIT	237	Literature as Witness	3.00	3.00	C
LIT	326	Crme, Puhmnt Jst Literature	3.00	0.00	F
LIT	327	Crime/Punishmnt/Just	3.00	0.00	F

2018 Spring Term
Queens College

Course		Description	Attempt	Earn	Grd
ENGL	391W	Vt: Senior Semi in Lit	3.00	3.00	B+

2018 Summer Term
John Jay College of Criminal Justice

Course		Description	Attempt	Earn	Grd
LIT	326	Crme, Puhmnt Jst Literature	3.00	3.00	A-
LIT	327	Crime/Punishmnt/Just	3.00	3.00	A-

Transfer Credits

Transfer Credit from Borough of Manhattan Community College

Incoming Course			
SPE 245	The Mass Media	3.00	A
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	3.00	A
Incoming Course			
SPE 240	Interpersonal Communication	3.00	A
Transferred to Term 2017 Spring Term as			
COM 2404	Interpersonal Communication	3.00	A
Incoming Course			
SPE 100	Fundamentals of Speech	3.00	A
Transferred to Term 2017 Spring Term as			
COM 1330	Public Speaking	3.00	A
Incoming Course			
SOC 100	Introduction to Sociology	3.00	A
Transferred to Term 2017 Spring Term as			
SOC 1101	Elements of Sociology	3.00	A
Incoming Course			
PSY 100	Introduction to Psychology	3.00	A
Transferred to Term 2017 Spring Term as			
PSY 1101	Introduction to Psychology	3.00	A
Incoming Course			
POL 100	American Government	3.00	A
Transferred to Term 2017 Spring Term as			
GOV 1101	American Government	3.00	CR
Incoming Course			
PHY 110	General Physics	4.00	A
Transferred to Term 2017 Spring Term as			
PHYS 1111	Principles of Science I	4.00	A
Incoming Course			
PHI 110	Logic	3.00	A
Transferred to Term 2017 Spring Term as			
PHIL 2102	Logical Thinking	3.00	A
Incoming Course			
PHI 100	Philosophy Transferred	3.00	A
to Term 2017 Spring Term as			
PHIL 2101	Introduction to Philosophy	3.00	A
Incoming Course			
MAT 150	Introduction to Statistics	4.00	A
Transferred to Term 2017 Spring Term as			
MAT 1272	Statistics	3.00	A
ELEC 1000	Elective Credit	1.00	A
Incoming Course			
MAR 100	Introduction to Marketing	3.00	A-
Transferred to Term 2017 Spring Term as			
MKT 1100	Essentials of Marketing	3.00	A-
Incoming Course			
HED 100	Health Education	2.00	A
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	2.00	A
Incoming Course			
ENG 321	Film	3.00	A
Transferred to Term 2017 Spring Term as			
ENG 2400	Films from Literature	3.00	A
Incoming Course			
ENG 201	Introduction to Literature	3.00	A
Transferred to Term 2017 Spring Term as			
ENG 1121	English Composition II	3.00	A
Incoming Course			
ENG 101	English Composition	3.00	B
Transferred to Term 2017 Spring Term as			
ENG 1101	English Composition I	3.00	B
Incoming Course			
COM 260	Small Group Communication	3.00	A-
Transferred to Term 2017 Spring Term as			
COM 1335	Group Communication	3.00	CR
Incoming Course			
COM 255	Intercultural Communication	3.00	A
Transferred to Term 2017 Spring Term as			
COM 2402	Intercultural Communication	3.00	A
Incoming Course			
COM 250	Conflict Resolution	3.00	A
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	3.00	CR
Incoming Course			
BUS 150	Business Communication	3.00	A
Transferred to Term 2017 Spring Term as			
COM 3401	Business & Professional Comm	3.00	A
Incoming Course			
ANT 100	Introduction to Anthropology	3.00	A
Transferred to Term 2017 Spring Term as			
ANTH 1101	Introductory Anthropology	3.00	A
Incoming Course			
AFN 124	African-American History	3.00	B
Transferred to Term 2017 Spring Term as			
AFR 1466	Modern African-American Hist	3.00	B
Incoming Course			
AFN 121	Hist Of African Civilizations	3.00	B
Transferred to Term 2017 Spring Term as			
AFR 1460	Early African History	3.00	B
Incoming Course			
THE 100	Introduction to Theatre	3.00	A
Transferred to Term 2017 Spring Term as			
THE 2180	Introduction to the Theatre	3.00	A
Incoming Course			
MES 152	Intro To Contemporary Media	3.00	C
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	3.00	C

Transfer Credit from Bernard M. Baruch College

Incoming Course			
PAF 4199	Selected Topics	3.00	B+
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	3.00	B+
Incoming Course			
PAF 3108	Public Campaigns And Advocacy	3.00	B
Transferred to Term 2017 Spring Term as			
ELEC 1000	Elective Credit	3.00	B
Incoming Course			
BUS 1000	Introduction to Business	3.00	C
Transferred to Term 2017 Spring Term as			
BUS 1126	Introduction to Business	3.00	C
Rejected Credits			
MTH 2003	Precal & Elem of Cal	3.00	F
Rejected Credits			
PAF 3201	Public Comm and Organizations	3.00	WU
Rejected Credits			
MTH 2003	Precal & Elem of Cal	3.00	WU
No Transfer Rules for Course			
PAF 3343	Bldg Cities: Mkts & Govt	No Rule 3.00	FIN
Rejected Credits			
PAF 3010	Policy and Politics	3.00	F

June 19, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to add my highest recommendation to the candidacy of Trevor Colliton for a federal judicial clerkship in your chambers. Based on my experience with Mr. Colliton over the past two years, I find him to be an extraordinarily bright and highly-motivated student.

Mr. Colliton was a student in my Contracts class for two semesters in his first year of law school. In both classes he distinguished himself in every possible way. He's a thoughtful individual who has excelled at everything I have seen him attempt. He had little trouble grasping the nuance and reasoning of the case law from the beginning of the year, reading cases with attention to detail and using them effectively to make persuasive legal arguments. His legal reasoning is logical and deep, and his writing is clear, well-organized, and persuasive. These skills earned him one of only a few A's in the large lecture class both semesters. I would easily rank him among the top five percent of students I have taught over the past twenty-five years.

In class, Mr. Colliton was a frequent participant, consistently challenging assumptions and raising important issues in a thoughtful way. It was clear early on that his extensive and highly-successful experiences in debate during college, and teaching and coaching debate before law school, contributed to a confident and persuasive legal advocate in the making.

Based on Mr. Colliton's maturity, understanding of the law, and commitment to justice, I sought him out as a teaching assistant for Contracts this past year. In that capacity, he held weekly office hours, tutored individual students, provided feedback on writing assignments, and conducted several review sessions for the entire class. Needless to say, Mr. Colliton's work was exceptional. The students found him approachable and knowledgeable about contract law and consistently fought to be in his section; and I found his assistance with course materials invaluable.

On top of everything else, Mr. Colliton is very active and highly regarded in the law school community. He has taken many leadership roles and commands great respect from both his fellow students and from faculty. He is exceptionally smart, passionate about CUNY Law's public service values, and eager to implement them in his work. It goes without saying that I would welcome the opportunity to work with him on any future project during his time at the law school.
In sum, I am confident Mr. Colliton will continue to distinguish himself in whatever endeavors he undertakes. I recommend him without hesitation. If you would like any additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

July 21, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am honored to write on behalf of Trevor Colliton, whom I have known for the last five years. In 2018-19, Trevor was my assistant teacher at Achievement First Brooklyn High School, a charter school serving a predominantly Black and Latinx population where most of the students qualified for free or reduced lunch and became the first in their family to attend college. Specifically, Trevor supported me as a debate coach, leading after-school practices and daily classes to support our students across various debate categories. Trevor's job was a demanding one that not only entailed teaching argumentation but additionally building a culture that enabled students who had been systematically marginalized to find their voice and hold their own in a competitive debate world dominated by wealthy white students from private schools. But thanks to Trevor's talent and work ethic, that was our most successful season. That year, several of our students won awards at Princeton, one of our students won the New York State Championship, and one even won Harvard.

Trevor may be the smartest person I have ever met. He has an archive-like memory that came in handy when helping students prepare cases. Ask him who was vice president in 1836, or what the capital of Lithuania is, or what currency they use in Uganda, and he will tell you offhand. His training as a collegiate debater allows him to process arguments and plan rebuttals with impressive speed. He has been chosen to serve on judging panels at elite collegiate debate competitions and he is respected on the national and international debate circuits.

In addition to being a brilliant thinker, Trevor is relentless. There were many nights we would be the last ones in the school building and the security guards would have to shoo us out the door at 9pm. There were many Saturday mornings waking up at 5am to take kids to tournaments. There were many weeks in a row where Trevor didn't get a break from teaching or tournaments, but his enthusiasm never waned, even for a moment. When I left that June, Trevor led the Speech & Debate program on his own the following year and kept the team alive during the challenges of COVID.

I have no doubt Trevor will make a terrific clerk due to his breadth of knowledge, impressive memory, relentless tenacity, and deep moral integrity. I cannot offer him a stronger recommendation.

Very sincerely yours,
K.M. DiColandrea

K.M. DiColandrea - k.m.dicolandrea@gmail.com - (917) 680-9094

July 21, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Trevor Colliton

Dear Judge Browning:

I highly recommend Trevor Colliton for a clerkship in your chambers. Based on my past experience as a federal appellate clerk and my observation of Trevor's coursework and extracurricular activities during law school, I am confident that he possesses the analytical acumen necessary to assess competing arguments and resolve complex disputes for the right reasons.

I was fortunate to have the opportunity to supervise Trevor's work in the Economic Justice Project (Public Benefits), a law school clinic I co-direct that operates both as a live-client clinic and a doctrinal course in social welfare law and policy with an emphasis on administrative law and civil procedure. Trevor's diligent work in the clinic demonstrated his dedication to expanding access to higher education and public benefits for low-income college students.

Trevor's commitment to legal excellence truly stands out, however, in his commitment to oral advocacy and appellate brief-writing in the competitive work of Moot Court. There, he has put in countless hours to conduct independent research and construct arguments relating to highly complicated legal issues currently facing the federal courts. As a result, he has developed the ability to look beneath the surface of opposing arguments to evaluate the strengths or weaknesses of their foundational premises.

Trevor also brings strategic skills from his internship with the U.S. Attorney's Office for the Eastern District of Michigan, and he will continue to hone his legal research and writing skills this summer as a judicial intern for New York Court of Appeals Senior Associate Judge Jenny Rivera.

Trevor is sharp, thoughtful, and personable. He balances healthy skepticism with an open mind. In short, Trevor would make an invaluable contribution to the work of the court. I would be pleased to speak with you should you require any additional information regarding Trevor's candidacy. Thank you very much for your time and attention.

Sincerely,

/s/ Lynn D. Lu
Associate Professor of Law

Lynn Lu - lynn.lu@law.cuny.edu - (718) 340-4601

Writing Sample I - Trevor Colliton

I often write for fun. This is an example from a few days ago. No one gave me feedback on it. I argued that the Sixth Circuit uses too strict a test to decide when social media accounts are state actors.

The Supreme Court's "composition-and-workings test" should dictate when social media accounts are state actors. State actors must comply with the Fourteenth Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Governments are not the only state actors. *Id.* For example, an interscholastic athletics association was a state actor when overwhelmingly composed of public-school officials and working to help their schools. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298-99 (2001). Public-school officials composed 84% of the association's members and 100% of its leaders. *Id.* at 291, 299. The association worked to regulate sports between its high schools. *Id.* at 298-300. That composition-and-workings test can assess state action whenever *any* private entity involves public officials and helps government.

Yet the Sixth Circuit created a "duty-or-authority requirement" that finds social media accounts to be state actors in only two ways. *Lindke*

v. Freed, 37 F.4th 1199, 1203-04 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023). One way is that a public official has a duty to use the account. *Id.* The other way is that an official needs state authority to use the account as they do. *Id.* In *Lindke*, an appointed city manager posted on Facebook about personal and job matters. *Id.* at 1201. Under some of those posts, a citizen criticized local pandemic policies. *Id.* at 1201-02. Then the city manager blocked the citizen from commenting on his page. *Id.* at 1202. The Sixth Circuit held that the city manager had no duty to run the Facebook account because no law compelled or state budget funded it. *Id.* at 1204-05. And they doubted that the city manager invoked his authority because no staffers helped operate his page, not all communications with constituents are government work, and his posts did not carry force like police officers' commands. *Id.* at 1205-06. The court conceded their duty-or-authority requirement "part[s] ways with other circuits' approach to state action" on social media. *Id.* at 1206. But more importantly, the Sixth Circuit strayed from Supreme Court precedent in four respects.

First, a private entity appears to be a state actor when composed of only a public official. An entity seems like government if it would be

unrecognizable without public officials' involvement. *Brentwood*, 531 U.S. at 300. When a social media account's sole administrator is a public official, it is 100% controlled by representatives of the state—more than *Brentwood*'s 84%. *See id.* at 299-300. And an entity presents a public identity unless enough purely private actors distinguish it from the state. *See id.* In *Lindke*, the city manager did not collaborate with civilians on his Facebook account. *See* 37 F.4th at 1201. Yet the Sixth Circuit found him to be a private actor partially because he did not recruit other public officials to help run the account. *Id.* at 1205.

Second, a public official works when they represent constituents. That includes when their job descriptions do not require them to. The *Brentwood* public-school officials' duties did not explicitly involve joining an interscholastic athletics association. *See* 531 U.S. at 299. But a job description is "one fact" that cannot "function as a necessary condition across the board for finding state action." *See id.* at 295-96. Instead, courts must use "normative judgment" about a "range of circumstances" to decide whether it is fair to attribute conduct to the state. *Id.* In *Brentwood*, nearly all high schools in the state spent money on sports competitions. *Id.* at 299. The competitions were an "integral

part" of education. *Id.* So the only rational view was that school officials represented their students while serving the association. *Id.*

Public executives represent people too. In *Lindke*, even the city manager believed his regular interactions with locals were "essential to good government." 37 F.4th at 1205. Yet the Sixth Circuit found such conversations on Facebook private. *Id.* The court said that a public official could have a duty to use social media for only two reasons. *Id.* One reason is that an official uses government funds to run an account. *Id.* The other reason is that a law forces an official to use an account. *Id.* The Sixth Circuit drew these "bright lines" to make the doctrine more predictable. *Id.* at 1206-07. But the Supreme Court did not want to let public officials escape liability based on technicalities—"criteria [with] rigid simplicity." *See Brentwood*, 531 U.S. at 295. The Supreme Court finds state action where civilians think an official represents the public. *See id.* at 299.

Third, a public official works when they informally communicate with constituents about government matters. In *Brentwood*, the private interscholastic association helped school officials agree to and enforce a rules scheme. *Id.* The officials' conversations about rules were informal

in that the state had long claimed the association was private. *Id.* at 300. Still, the association was a state actor. *Id.*

Public executives often talk informally too. They might discuss their work with constituents outside government buildings or state-approved meetings. *See Lindke*, 37 F.4th at 1205. Yet the Sixth Circuit cited no authority for why government communications can be state action only if formal. *See id.* The court merely reasoned that public officials will be too burdened if *every* informal conversation they have with constituents is state action. *See id.*

Fourth, a public official works when they purport to exert state influence. While a deputized person was an amusement park employee, his ordering Black people to leave, arresting them, and pressing charges against them were state action because he self-identified as a police officer. *Griffin v. Maryland*, 378 U.S. 130, 131, 135 (1964). But the police are not the only public officials who can be state actors while purporting to act for the government. The *Griffin* court held that liability extends to "an individual [] possessed of state authority" even if "he might have taken the same action . . . in a purely private capacity or [] the particular action which he took was not authorized by state law."

Id. at 135. The court did not limit liability to those who have policing authority, take actions of force, or are subject to regulations on law enforcement. *See id.* All three other circuit courts that decided the issue recognized that non-police officials could be state actors when purporting to use their powers. *See Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (President), *vacated as moot sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021); *Davison v. Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019) (Chair of County Supervisors); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1177 (9th Cir. 2022) (Public-School District Trustees), *cert. granted*, 143 S. Ct. 1779 (2023). Yet the Sixth Circuit held that only the police can be state actors while pretending to act for the government because people must obey their directions. *See Lindke*, 37 F.4th at 1206.

Thus, the Sixth Circuit's duty-or-authority requirement is too strict to decide when social media accounts are state actors.

Writing Sample II - Trevor Colliton

I wrote about several legal issues during my 1L seminar. One scenario involved a man who yelled at a police officer in public. My professor assigned me to draft arguments to dismiss a disorderly conduct charge. This is an excerpt from it that only I edited.

PO Wasserman lacked probable cause to arrest Mr. Johnson for violating N.Y. Penal Law § 240.20(3). PO Wasserman did not believe that Mr. Johnson intended to cause or recklessly risked public inconvenience, annoyance, or alarm. Three factors that determine whether public harm occurred are: (1) the time, place, nature, and character of conduct; (2) the number of people in the vicinity and nature and number of people attracted to the disturbance; (3) other relevant circumstances. *People v. Baker*, 20 N.Y.3d 354, 360 (2013).

First, the time, place, nature, and character of conduct suggest public harm only if the defendant was significantly likely to "disrupt peace and order in the vicinity." *Id.* at 363. In *Baker*, disruption was not significantly likely from a bustling vicinity, extremely brief outbursts, or cursing without threatening action. *Id.* at 362–63. Here, Mr. Johnson was unlikely to disrupt peace and order in his vicinity for four reasons.

Mr. Johnson's vicinity was harder to disrupt than the undisrupted vicinities in *Baker* and *People v. Gonzalez*, 25 N.Y.3d 1100 (2015). A bustling area is hard to disrupt. *Baker*, 20 N.Y.3d at 363. Mr. Johnson was one block from EMTs treating patients and seven officers speaking with witnesses of a large street fight. Pl. 's Ex. A ¶¶ 11–13. Disputes that did not occur near violent conflict were in less bustling areas. *See Baker*, 20 N.Y.3d at 362–63; *Gonzalez*, 25 N.Y.3d at 1101.

The substance of Mr. Johnson's outburst was undisruptive. "Pure speech directed at an individual" does not establish intent to create public disorder. *Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir. 2013). The *Swartz* officer did not have probable cause to arrest a driver for disorderly conduct when they gave the finger—an "ancient gesture of insult"—while moving past an officer. *Id.* at 110. Nor did a court officer have probable cause to arrest someone who walked past him and said, "[o]ne day you're [going to] get yours," unaccompanied by any actions suggesting immediate violence. *Posr v. Ct. Officer Shield No. 207*, 180 F.3d 409, 415 (2d Cir. 1999). Throughout the dispute, Mr. Johnson stood in place outside his home. Pl. 's Ex. A ¶ 20. So Mr. Johnson's words toward PO Madison were even less likely to attract an audience

than the driver moving far along a public road in *Swartz* or the court observer walking through a public courthouse in *Posr*.

The duration of Mr. Johnson's outburst was as undisruptive as in *Baker* and less disruptive than in *Gonzalez* and *Provost v. City of Newburgh*, 262 F.3d 146 (2d Cir. 2001). An extremely brief outburst is not disruptive. *Baker*, 20 N.Y.3d at 362. There is no evidence that Mr. Johnson's alleged noise lasted longer than the 15-second obscene statements in *Baker*. *Compare* Pl. 's Ex. A ¶ 20, *with* 20 N.Y.3d at 362. The *Gonzalez* "rant against the police" spanned an unknown duration longer than Mr. Johnson's alleged noise that ended fast enough for PO Wasserman to be unable to identify its source soon after. *Compare* 25 N.Y.3d at 1101, *with* Pl. 's Ex. A ¶ 18. Mr. Johnson's alleged noise was far briefer than the *Provost* hourlong obscenities. *Compare* Pl. 's Ex. A ¶ 18, *with* 262 F.3d at 159–160.

PO Wasserman appeared as undisrupted as the *Baker* and *Gonzalez* officers. An officer can show disruption by remaining in a car, rolling up a window, telling their partner to take cover, or requesting backup beyond their partner. *See Baker*, 20 N.Y.3d at 362. Like the *Baker* and *Gonzalez* officers, PO Wasserman did not ask for backup despite that

other officers were on the scene. *Compare id.* at 357, *and* 25 N.Y.3d at 1101, *with* Pl. 's Ex. A ¶¶ 20–22.

Second, the number of people in the vicinity and the nature and number of people attracted to the disturbance only suggest public harm if bystanders showed motivation to "involve themselves in the dispute between defendant and [an officer]." *Baker*, 20 N.Y.3d at 363. Bystanders did not show motivation to involve themselves in a dispute when they made surprised and curious looks at, evaded, and did not follow the suspect. *Gonzalez*, 25 N.Y.3d at 1101. But bystanders would have shown motivation to involve themselves in a dispute if they had appeared inclined to "join forces with defendant and gang up on [an officer]." *See Baker*, 20 N.Y.3d at 362.

Like the *Baker* and *Gonzalez* bystanders, Mr. Johnson's bystanders seemed disinclined to join forces with the arrestee against another disputant. *See* Pl. 's Ex. A ¶¶ 18–19. It was unclear whether the *Baker* bystanders were looking to fight police. *See* 20 N.Y.3d at 357. And some *Gonzalez* bystanders looked surprised and made evasive movements without revealing whether further surprise or ineffective evasiveness would prompt violent reactions. *See* 25 N.Y.3d at 1101. By contrast, Mr.

Johnson's three bystanders who filmed would surely not want to undermine their efforts to hold officers accountable by risking police seizing their devices. *See* Pl. 's Ex. A ¶ 19. And the other bystanders complaining about the frequency of police harassment in their community seemed too pessimistic to think that they could free Mr. Johnson by getting between him and the officers. *See id*.

Third, other relevant circumstances suggest public harm if an officer cannot defuse the dispute. *Baker*, 20 N.Y.3d at 363. A police officer's training is almost always sufficient to defuse a dispute that involves abusive statements exclusively toward an officer, unaccompanied by provocative acts or other aggravating circumstances. *Id*. A disputant officer can defuse a dispute by summoning a neutral officer to assist. *Id*. at 362.

PO Wasserman could have defused the dispute because he had about as many backups as the lead *Gonzalez* officer and more backups than the lead *Baker* officer. The *Baker* officer had only one backup. 20 N.Y.3d at 362. The plural "police officers" in *Gonzalez* approximates PO Wasserman's four nearby backups of PO Madison and POs John Doe #1–3. *Compare* 25 N.Y.3d at 1101, *with* Pl. 's Ex. A ¶¶ 19–21. And PO

Wasserman could have asked three officers one block away to help him. *See* Pl. 's Ex. A ¶ 13.

The time, place, nature, and character of the dispute suggested low odds of disruption, the bystanders were peacefully critical, and PO Wasserman did not act as if the dispute would sustain. Therefore, PO Wasserman lacked probable cause that Mr. Johnson intended to cause or recklessly risk public harm.

Applicant Details

First Name	**Benjamin**
Middle Initial	**M.**
Last Name	**Donvan**
Citizenship Status	**U. S. Citizen**
Email Address	**ben.donvan@gmail.com**
Address	**Address** Street **93 15th St Apt 1F** City **Brooklyn** State/Territory **New York** Zip **11215** Country **United States**
Contact Phone Number	**2026802837**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2019**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marden Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Miller, Arthur
arthur.r.miller@nyu.edu
212-992-8147

Hertz, Randy
hertz@nyu.edu
212-998-6434

Sharkey, Catherine
catherine.sharkey@nyu.edu
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

BENJAMIN MISHORI DONVAN
93 15th St., Apt 1F, Brooklyn, NY 11215 • bmd338@nyu.edu • (202) 680-2837

July 1, 2023

The Honorable James O. Browning
United States District Court
District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to apply for a clerkship in your chambers beginning in 2024. I am a rising third-year student at NYU where I serve as the Digital Executive Editor of the *Review of Law and Social Change*.

I hope to use this clerkship as an opportunity to apply skills as a writer, researcher, and critical thinker that I have been building throughout my education, but especially during law school. I had the honor to work as a research assistant for Professor Arthur Miller, updating *Federal Practice and Procedure*. It meant a great deal to me that my review, analysis, and summary of hundreds of cases contingent on applications of Rule 50 resulted in a small but material contribution to the practice of law. I also reveled in the chance to TA for CivPro in the fall, and to use what I had learned over the summer to help 1Ls grow.

I would also highlight my clinical placement at the NRDC. As part of a small team working on a complicated case, creativity was just as critical to our output as deep research. I was pleased that several of my own ideas proved useful. But that was only possible with a mastery of detail, and the ability to synthesize facts and law efficiently and effectively.

As a current summer associate at Covington, I am both diving into fresh new areas, such as insurance law, data privacy, and IP disputes, and treading new ground in the more-familiar and ever-intriguing civil procedure. I am taking it all in.

I love learning, and where it concerns the law, I know I have a lot more of that to do. That is my primary goal in seeking this clerkship. I look forward to the chance to grow through experience and service.

Enclosed, please find my resume, law school transcript, writing sample, and letters of recommendation from Professors Randy Hertz, Arthur Miller, and Catherine Sharkey. I am available for an interview at your convenience, either in-person or remotely. Thank you for your time and consideration.

Respectfully,

/s/

Benjamin Mishori Donvan

BENJAMIN MISHORI DONVAN
(202) 680-2837
bmd338@nyu.edu

Local Address
93 15th St, Apt 1F
Brooklyn, NY 11215

Permanent Address
2729 Dumbarton St. NW
Washington, DC 20007

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
Candidate for J.D., May 2024
Honors: *N.Y.U. Review of Law & Social Change*, Digital Executive Editor
Activities: Teaching Assistant, Civil Procedure (Fall 2022)
American Constitution Society, Membership & Media Chair
Law Revue, Actor, Writer, and Producer
Marden Moot Court Competition (Fall 2022)

UNIVERSITY OF CHICAGO, Chicago, Illinois
B.A. in History, *General Honors*; Minor in Human Rights, June 2019
Honors: Dean's List (all years)
Chicago Center for Jewish Studies Undergraduate Essay Prize (2018)
Activities: Dormitory House President (2016-2017), Dormitory House RA (2017-2019)
Run for Cover A Cappella Group, Treasurer
UChicago Glee Club, Duke

EXPERIENCE

COVINGTON & BURLING LLP, New York, NY
Summer Associate, Summer 2023
Participate in all aspects of complex commercial litigation and white-collar matters, including a pharmaceutical contractual dispute and a high-stakes Congressional investigation. Research includes projects on media law; remote international depositions and the Hague Evidence Convention; and New York law on "known loss" provisions in insurance coverage for products liability claims.

NATURAL RESOURCES DEFENSE COUNCIL, New York, NY
NYU Environmental Law Clinic, Spring 2023
Participated in all aspects of a lawsuit against a federal agency. Wrote research memoranda on Endangered Species Act consultation; Clean Water Act permitting, interstate pollution, and point sources; and Fourth Circuit pleading standards, standing requirements, and agency action review.

PROF. ARTHUR R. MILLER, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, June 2022 – January 2023
Conducted extensive legal research in civil procedure; updated Wright & Miller's Federal Practice and Procedure treatise, Volumes 9B (FRCP 46-50), 14A (Foreign Sovereign Immunities Act), and 14AA (Jurisdiction of D.C. Courts), focusing heavily on *Palin v. NYT* and *Cassirer v. Thyssen-Bornemisza*.

GOVERNMENT ACCOUNTABILITY PROJECT, Washington, DC
Junior Fellow, February 2021 – August 2021; ***Legal Intern,*** November 2019 – June 2020
Supported attorneys in various whistleblowing and FOIA matters. Drafted legal documents and disclosures to Congress and administrative agencies on issues like gross mismanagement at Ft. Bliss EIS, politically motivated antitrust investigations at DOJ, and climate denialism at DOI.

ADDITIONAL INFORMATION

In 2020, volunteered at Public Counsel and chaired a committee for the DC Ward 2 Democrats. Hobbies include: singing and performing; writing sketches and screenplays; and homebrewing beer.

Name: **Benjamin Mishori Donvan**
Print Date: **06/01/2023**
Student ID: **N11172431**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Colleen P Campbell			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	A-
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Business Crime	LAW-LW 11144	4.0	A-
Instructor: Jennifer Hall Arlen			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Arthur R Miller			
Economic Analysis of Public Law	LAW-LW 12695	4.0	B+
Instructor: Ryan J Bubb, David Carl Kamin			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Environmental Law Clinic Seminar	LAW-LW 10633	2.0	A
Instructor: Kimberly W Ong, Eric A Goldstein			
Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A
Instructor: Randy Hertz			
Environmental Law Clinic	LAW-LW 11120	3.0	A-
Instructor: Kimberly W Ong, Eric A Goldstein			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Trisha Michelle Rich			
Business Torts: Defamation, Privacy, Products and Economic Harms	LAW-LW 11918	4.0	B+
Instructor: Catherine M Sharkey			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	60.0	60.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

THE UNIVERSITY OF CHICAGO

Name: **Benjamin Mishori Donvan**
Student ID: **10457419**

Undergraduate

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2019
Degree Honors: With General Honors
History (B.A.)

Academic Program History

Program: The College
Start Quarter: Autumn 2015
Current Status: Completed Program
History (B.A.)
Human Rights (Minor)

External Education

Saint Albans School
Washington, District of Columbia
Diploma 2015

Test Credits

Test Credits Applied Toward Bachelor's Degree

	Earned
Totals:	500

Beginning of Undergraduate Record

Autumn 2015

Course		Description	Attempted	Earned	Grade
GRMN	10100	Elementary German For Beginners-1	100	100	A
HUMA	17000	Language & The Human-I	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
MATH	15200	Calculus-2	100	100	B+

COLLEGE LANGUAGE REQUIREMENT COMPLETED

Winter 2016

Course		Description	Attempted	Earned	Grade
ANTH	24002	Colonizations -2	100	100	A-
GRMN	10200	Elementary German For Beginners-2	100	100	A
HUMA	17100	Language & The Human -II	100	100	A-
HUMA	19100	Humanities Writing Seminars	0	0	P

Spring 2016

Course		Description	Attempted	Earned	Grade
CMST	27205	Film Aesthetics	100	100	B
ENGL	16600	Shakespeare-2: Tragedies/Romances	100	100	B
GRMN	10300	Elementary German For Beginners-3	100	100	A-
HIST	12100	War In The Middle Ages	100	100	B+

Honors/Awards
DEAN'S LIST 2015-16

Autumn 2016

Course		Description	Attempted	Earned	Grade
HIST	27207	The North American West, 1500 - 1900	100	100	B+
PLSC	22710	Electoral Politics In America	100	0	W
RLST	20150	Mediterranean Thinkers: Jewish Thought in the Medieval Islami	100	100	A
SOSC	12100	Self, Culture And Society-1	100	100	A-

Winter 2017

Course		Description	Attempted	Earned	Grade
ARTV	10300	Visual Language: On Time and Space	100	100	A
HIST	18303	Colonizations III	100	100	B+
HIST	27001	Law & Soc In Early Amer	100	100	B+
SOSC	12200	Self, Culture And Society-2	100	100	B+

Spring 2017

Course		Description	Attempted	Earned	Grade
CRES	10200	Introduction To World Music	100	100	A
GRMN	20100	Deutsche Maerchen	100	100	B+
HIST	26125	Revolution Under Empire: Mexico-U.S. Relations 1900-1945	100	100	B+
SOSC	12300	Self, Culture And Society-3	100	100	A-

Honors/Awards
DEAN'S LIST 2016-17

Autumn 2017

Course		Description	Attempted	Earned	Grade
BIOS	10130	Core Biology	100	100	A-
HIST	25424	The Nuclear Age	100	100	A
HIST	29304	Human Rights: Contemporary Issues	100	100	A
HIST	29662	Hist Colloquium: Gender & Sexuality in US History, 1620-1920	100	100	B+

Winter 2018

Course		Description	Attempted	Earned	Grade
CLCV	28517	History of Skepticism	100	100	A
HIST	27012	Histories of Violence in the United States	100	100	B
HMRT	24701	Human Rights: Alien & Citizen	100	100	A-

THE UNIVERSITY OF CHICAGO

Name: Benjamin Mishori Donvan
Student ID: 10457419

Undergraduate

Spring 2018

Course		Description	Attempted	Earned	Grade
HIST	18500	Politics Film 20th C Amer Hist	100	100	A
HIST	29801	BA Thesis Seminar I	100	100	A-
HMRT	21403	Health in a Changing America: Social Context and Human Rights	100	100	B+
MUSI	24417	Making and Meaning in the American Musical	100	100	B+

Honors/Awards
Chicago Center for Jewish Studies Essay Prize

DEAN'S LIST 2017-18

Autumn 2018

Course		Description	Attempted	Earned	Grade
BIOS	13128	Plant-Animal Interactions	100	100	B+
CRES	21201	Chicago Blues	100	100	A
CRES	27527	Music, Immigration, and Ethnic Formation in the U.S. City	100	100	A
HMRT	22201	Philosophies of Environmentalism and Sustainability	100	100	A-

Winter 2019

Course		Description	Attempted	Earned	Grade
HIST	17204	Thou Shalt Not Kill: Human Rights and War from Napoleon to the War on Terror	100	100	A
HIST	22203	The Holy Roman Empire, 800-1500	100	100	A
HIST	29802	BA Thesis Seminar II	100	100	A-
HMRT	21499	Philosophy and Philanthropy	100	100	B+

Spring 2019

Course		Description	Attempted	Earned	Grade
ANTH	21306	Explorations in Oral Narrative	100	100	A-
HIST	29416	Modern European Intellectual History	100	100	A
RLST	28900	Magic, Science, and Religion	100	100	A-

Honors/Awards
DEAN'S LIST 2018-19

Undergraduate Career Totals

Cumulative GPA:	3.634	Cumulative Totals	4400	4300

Milestones

Language Competency
Status: Completed
Program: Bachelor's Degree
Date Completed: 09/26/2016
Milestone Level: Language Competency
Date Attempted: 09/26/2016 Completed

End of Undergraduate

Date Issued: 07/14/2022

New York University
A private university in the public service

School of Law

40 Washington Square South, 430F
New York, New York 10012-1099
Telephone: (212) 992-8147
Fax: (212) 995-4590
Email: arthur.r.miller@nyu.edu

Arthur R. Miller
University Professor

Dear Judge:

I am writing on behalf of Ben Donovan, who is applying for a position as your clerk following his graduation from the New York University School of Law in the Spring of 2024. Based on Mr. Donovan's first-year classroom and examination performance, I invited him to be one of my full time research assistants for the summer following his first year. He also was in my Complex Litigation course this past Spring and was a very successful teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Donovan edited and updated certain portions of the annual supplementation of sections related to Federal Rules 46 through 50 in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update the Civil Procedure hornbook I coauthor, particularly the material related to those and other rules. This was part of an effort to produce a new edition, which has now been published. In the course of working on these projects, Mr. Donovan did a considerable amount of research, editing, and writing, much of which required a great deal of thought, writing ability, legal analysis, and judgment on his part.

Ben's research and writing was excellent. His work product was complete and sound, indicating considerable mental ability, a good command of research techniques, good writing, and organizational skills. He also was able to master several aspects of federal civil procedure, some of which are complex. He worked on several topics that were outside the first year procedure course and difficult for someone with only one year of law school. He writes clearly and logically with an good sense of structure and idea sequence.

Ben is bright, thoughtful, analytically sound, and takes instruction and direction well. He also is constantly aware of the value of professional improvement. Mr. Donovan is a very helpful person by nature. He is conscientious and assisted other researchers to get things done so that we could stay on schedule. Ben's work always was done in timely fashion, with care and attention to detail. He understood fully the professional character and utility of his work. He is curious about issues, both legal and non-legal. He is willing to dig though materials until he fully understands them. I consider Ben to have been a reliable research assistant.

Mr. Donovan has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his law firm experience at Covington & Burling this summer following his second year of law school. Ben is a likable and good-natured individual; he has a pleasant personality, sense of humor, and is a good conversationalist. I thoroughly enjoy his company, even though a good deal of it

during his civil procedure couse had to be virtual because of Covid. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the world around him.

On the basis of my experience with him, Ben should fit in well in the collegial environment of a judge's chambers. He worked effectively with the other researchers the summer he spent with me and that should be true with regard to working with you and your other clerks and staff. I believe he can perform whatever tasks you ask of him.

If I can be of any further assistance to you with regard to Ben, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

July 01, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to recommend Ben Donvan for a clerkship.

I have had the pleasure of working with Ben in two courses. In his first semester of law school, he was in my 1L Criminal Law course. In the Spring semester of his second year, he was in my Criminal Procedure course.

In the 1L Criminal Law course, Ben stood out in a very large class (95 students) because he often made highly thoughtful comments in class. He received an A- in the course, based entirely on the exam. His exam score was only two points short of receiving an A.

In the Criminal Procedure course, he easily earned an A based on his outstanding work on the two papers for the course. In one paper, the students write a memorandum of points and authorities in support of a defense motion to limit the prosecution's use of the defendant's prior convictions to cross-examine the defendant at trial if he chooses to take the witness stand. The other paper takes the form of an internal memo from a capital defender office staff attorney to a supervising attorney about a number of substantive legal issues: the validity of the capital jury sentencing instructions in the case; a potential Brady claim; a potential claim of ineffective assistance of counsel; the availability of state postconviction review under the applicable state statutes despite the failures of trial and appellate counsel to preserve the claims; and the availability of federal habeas corpus review if the state postconviction courts rely on procedural bars to decline to reach the merits of the substantive legal claims.

In the papers, Ben demonstrated that he is an excellent researcher (he found all of the relevant authorities), a first-rate writer (his papers were extremely well-structured and he presented all of her arguments clearly and persuasively), and has terrific judgment (he made excellent choices about which of the potentially available arguments to make and which to forego, and he framed the arguments in the most persuasive way). I was impressed by the high quality of his work.

I believe that the characteristics I have observed in Ben – his intelligence; first-rate skills of researching and writing; thoughtfulness; and good judgment – would enable him to do an excellent job as a law clerk.

Respectfully,
Randy Hertz

Randy Hertz - hertz@nyu.edu - 212-998-6434

July 01, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to recommend Benjamin Donvan for a clerkship in your chambers. I first came to know Ben as a student in my 1L Torts class during the Spring 2022 semester (in which he earned an A-). Ben was also a student this past semester in my Business Torts seminar, in which he has earned a B+.

Ben was a valuable participant in my Torts class. He showed great interest and deep thinking about the role of tort law in advancing civil rights. He was engaged in our class discussions about tort law in the context of workplace and sexual harassment, and its use in the context of other civil rights disputes, such as in Sines v. Kessler, which arose from the 2017 Unite the Right event in Charlottesville.

Ben was also an engaged member of my Business Torts class. He showed great interest in the areas of defamation and disinformation, including in the Alex Jones trials, and his final paper offered an interesting perspective on the expansion of defamation protections to new media. He has also demonstrated great interest in AI algorithms and federal preemption of tort law.

On a personal level, Ben is a thoughtful, personable, and mature young man
who exhibits a genuine interest in the material. I believe he would be a valuable asset to your chambers. I hope you will seriously consider him as a candidate.

Sincerely,

Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

Benjamin M. Donvan

UNITED STATES DISTICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, vs. DANIEL DAVIS, Defendant	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANT'S IN LIMINE MOTION TO EXCLUDE THE PRIOR CONVICTION**

ARGUMENT[1]

Defendant Daniel Davis moves to exclude his prior conviction under Fed. R. Evid. 609 if he elects to testify at trial. Under Rule 609(a)(1)(B), the probative value of admitting the prior conviction does not outweigh the prejudicial effect on Mr. Davis. Secondly, under Rule 609(a)(2), Mr. Davis's prior conviction for willfully injuring Government property, 18 U.S.C. § 1361, did not require proving a dishonest act or false statement.

I. Under Rule 609(a)(1)(B), the Probative Value of Admitting the Prior Conviction Does Not Outweigh the Prejudicial Effect to Mr. Davis

Rule 609(a)(1)(B) indicates Mr. Davis's conviction is inadmissible. Its potential probative value is greatly outweighed by its prejudicial effect because the prior conviction and the currently charged crimes are substantially similar, Mr. Davis has had a clean criminal record in the ensuing years, only Mr. Davis can testify to certain material circumstances, and destroying government property has no bearing on Mr. Davis's credibility.

[1] I wrote this memorandum for the course Criminal Procedure: Arraignment to Postconviction Simulation, I took in Spring of 2023. I received no outside help in writing. A friend skimmed the writing this past week but only suggested two minor grammatical edits.

A. The Prior Conviction is Covered by Rule 609(a)(1)(B)

Rule 609 provides that a defense witness's credibility can be attacked by evidence of a criminal conviction, and the evidence "must be admitted," where the relevant crime was "punishable by death or imprisonment for more than one year," and "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B).

In 2016, Mr. Davis was convicted upon his admission of guilt for willfully injuring Government property by breaking the doors of postal boxes under 18 U.S.C. § 1361, causing damage in excess of $1,000. For damages greater than $1,000, the statute permits imprisonment "for not more than ten years," in addition to potential fines. 18 U.S.C. § 1361. This conviction is covered by the Rule's plain meaning.

B. The *Bedford* Factors Analysis Indicates that Admitting the Prior Conviction Would Be Unduly Prejudicial to Mr. Davis

When considering the probative value of a potential statement versus its potential prejudicial effect, Third Circuit courts balance four factors: "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness' testimony to the case; (4) the importance of the credibility of the defendant." *Gov't of V.I. v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982). District courts have "discretion to determine when to inquire into the facts and circumstances underlying a prior conviction and how extensive an inquiry to conduct." *U.S. v. Lipscomb*, 702 F.2d 1049, 1068 (D.C. Cir. 1983) (often favorably referenced in Third Circuit).

1. The Kind of Crime is Substantially Similar and Not Impeachable

In evaluating the underlying crime in the prior conviction, "courts consider the impeachment value of the prior conviction as well as its similarity to the charged crime." *U.S. v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014) (citing 5 Jack B. Weinstein & Margaret A. Berger,

Weinstein's Federal Evidence § 609.06 [3][b] (2d ed.2011)). "Impeachment value" refers to how relevant the prior conviction is to the witness's truthfulness. *Id.* "Prior convictions which are for the same or substantially the same conduct as the charged crime should be admitted sparingly because of their prejudicial effect." *U.S. v. Wilson*, 2016 WL 2996900, *2 (D.N.J. May 23, 2016) (citing *Gordon v. U.S.*, 383 F.2d 936, 940 (D.C. Cir. 1967)). A prior conviction need only "bear[] resemblance" to an alleged crime to be inadmissible. *U.S. v. Wise*, 581 F. Supp. 3d 656, 659 (D.N.J. 2022) (in a 609(b) ruling, prior sexual battery conviction overly resembled child sexual abuse material allegations).

Admitting prior convictions for such similar conduct, may cause a jury to "unfairly assume the defendant is prone to commit the particular offense and so must be guilty of the current charges." *Id.* (citing *Caldwell*, 760 F.3d at 286-87); *see also Old Chief v. U.S.*, 519 U.S. 172, 180 (1997) (prior convictions could cause a jury to "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged."); *U.S. v. Sanders*, 964 F.2d 295, 297-98 (4th Cir. 1992) ("The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.").

The probative value of Mr. Davis's prior conviction does not outweigh its prejudicial effect. His prior conviction is willful injury of Government property under 18 U.S.C. § 1361 and he is now charged with two counts each of committing forgery 18 U.S.C. § 495 and mail theft under 18 U.S.C. § 1708. The prior conviction is too similar to mail theft to be admitted into evidence. While willful injury of Government property may not be identical to mail theft, they are quite similar and do "bear[] resemblance" to one another. *Wise*, 581 F. Supp. 3d at 659.

First, a juror may associate injury to government property with the destruction of the mailbox at 1207 MacArthur Boulevard, a key fact upon which the entire case is built. The statute covers theft of mail from any "letter box" or "mail receptacle," 18 U.S.C. § 1708, and allegedly, such theft here was accomplished via "ripp[ing] open" Vivian Vincent's mailbox. (App. B. at 2.) A letterbox pried open in such a manner is intimately linked to Mr. Davis's prior injury of the government mailbox. Even if the court can do no more than ask whether he was convicted, *U.S. v. Sallins*, 1993 WL 427358 (E.D.P.A. Oct. 18, 1993), his destruction in the past becomes material to the present destroyed mailbox. With the first link, the chain is forged.[2] Proving every charge is contingent on showing his initial breach of the mailbox. Mr. Davis could not have stolen the mail or possessed it, nor forged the signature on the check or cashed it without first damaging the mailbox. Admitting the prior conviction would heighten the risk of impermissible inference of Mr. Davis's guilt. *See U.S. v. Miller*, 2004 WL 2612420, at *5 (E.D.P.A. Nov. 16, 2004). And the danger of "unfair prejudice, even with a limiting instruction … outweighs the probative value of the evidence." *United States v. Cherry*, 2010 WL 3156529, at *6 (E.D.P.A. Aug. 10, 2010).

Regarding the potential impeachment value, the circumstances of the conviction matter. Mr. Davis was sentenced to 15 months' probation, rather than anything approaching the ten years' imprisonment permitted by the law, suggesting this offense was altogether relatively inoffensive and insignificantly impeachable. *See U.S. v. Bernard*, 2021 WL 3077556 (E.D.P.A. Jul. 21, 2021) (relatively low sentences weigh against the impeachment value of evidence). Davis's decision to plead guilty rather than go to trial may further reduce the impeachment value of the conviction, because a defendant's admission of guilt in a plea deal suggests they are

[2] *Star Trek: The Next Generation* (April 29, 1991) (albeit taken somewhat out of context).

honest. *See Lipscomb*, 702 F.2d at 1066 (discussing then-Senator Biden's belief that pleading guilty speaks well to a defendant's credibility). While "felony conviction[s] ha[ve] some inherent impeachment value," the connection between the destruction of Government property and Mr. Davis's "likelihood of testifying truthfully is attenuated." *Bernard*, at *2.

2. The Age of the Conviction Reduces the Probative Value of the Admission

Convictions more than ten years old must satisfy the requirements of 609(b) for admission. "But even where the conviction is not subject to the ten-year restriction, 'the passage of a shorter period can still reduce [a prior conviction's] probative value.'" *Caldwell*, 760 F.3d at 287 (citing 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6134, at 258 (2d ed.2012)). "A conviction's age weighs particularly in favor of exclusion 'where other circumstances combine with the passage of time to suggest a changed character.'" *Id.* In practice, courts have found that "the probative value of a conviction decreases as its age increases." *United States v. Cherry*, 2010 WL 3156529, at *7 (E.D.P.A. Aug. 10, 2010).

Six and a half years ago, on December 31, 2016, twenty-two-year-old Daniel Davis plead guilty to violating 18 U.S.C. 1361. He was sentenced to 15 months of probation, which he completed without issue. This was his only brush with the law, and he now works full-time as a forklift operator at a radiator plant. Mr. Davis's spotless record over the past six and a half years, in addition to his full-time employment, "suggest[s] a changed character." *Caldwell*, 760 F.3d at 287 (citation omitted). For that reason, the age of his prior conviction weighs against its admission.

3. Mr. Davis's Own Testimony is Required at Trial

A defendant's "tactical need … to testify on his own behalf may militate against the use of impeaching convictions." *Caldwell*, F.3d at 287 (citations omitted). If the accused must testify

to refute strong prosecution evidence, "the court should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying." *Id.* But if "the defense can establish … the defendant's testimony by other means," a defendant's testimony is less necessary, and a prior conviction is more likely to be admitted. In other words, the prejudicial impacts of admission may be lessened if other defense witnesses can provide the same testimony as the defendant. *See*, *e.g.*, *United States v. Causey*, 9 F.3d 1341 (7th Cir. 1993).

The third Bedford factor further supports excluding the prior conviction. Several witnesses can attest to Mr. Davis's presence at the Veterinary Clinic. (App. B. at 7.) They can testify to his presence in the procedure room, the length of the procedures, his signatures, and the probable time he spent in the waiting room. But with respect to actual times, they can only concretely support that he called the clinic at 9:10 A.M. and that his dog was discharged at 10:50 A.M. (App. B. at 7-8.) Beyond that, there exist greater windows of uncertainty and many variables at play. For one, if the mailman arrived at 1207 MacArthur Blvd as early as 9:25 A.M., (App. B. at 4-5.), and everything else, including transit, (App. B. at 8.), and the medical procedure, (App. B. at 7-8.), had gone as quickly as possible, that would leave approximately ten to fifteen minutes when something could have happened to the mailbox before Vivian Vincent came down to check her mail at approximately 10 A.M. (App. B. at 3.) Alternatively, Mr. Davis may have even left the building immediately after his phone call, hit heavy traffic, sat through a longer procedure, and still have been discharged at 10:50 A.M. There are too many uncertainties to rely wholly on other defense witnesses for this period. Only Mr. Davis can testify about this timeline. Further, only Mr. Davis can testify with respect to never having been to the liquor store in Bensalem. Just a single witness, Boris Smirnoff, testified to having identified Mr. Davis as the man he believed cashed the check at a police line-up. (App. B. at 5.) Challenging enough as it is

to prove a negative—that he had never been to the store—only Mr. Davis can testify on this matter.

4. Mr. Davis's Credibility is Not Sufficiently Significant to the Case

The fourth factor concerns the significance of the defendant's credibility to the case. "When the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction." *Caldwell*, 760 F.3d at 288 (citation omitted). In a case "reduced to a swearing contest between witnesses, the probative value of a conviction is increased." *Id.* When a defendant testifies, he places his own credibility at issue. *See United States v. Beros*, 833 F.2d 455, 463-64 (3d Cir. 1987).

This factor may lean slightly towards admission of the prior conviction, but not enough to overcome the first three factors which favor exclusion. Especially with respect to the forgery charges and Mr. Davis's presence at the liquor store, this case may settle into a "he said, they said" battle between Mr. Davis, Mr. Smirnoff, and the prosecuting attorneys. *Caldwell*, 760 F.3d at 288. Yet, it should further be noted that, given Mr. Davis's story is corroborated by the Veterinary Clinic and its employees, there is evidence that Mr. Davis is credible. That is, going on the stand to testify, having already been supported in asserting he was not present when the mailbox was broken into—having been made credible there—lends credence to the idea that Mr. Davis is credible with respect to the forgery charges and the check cashing at the liquor store, too.

Taken together, the *Bedford* factors tilt the Rule 609(a)(1)(B) scales too far in the direction of prejudice to admit Mr. Davis's prior conviction. The conviction simply does not "tangibl[y] contribut[e] to the evaluation of credibility" necessary to outweigh prejudice.

Caldwell, 760 F.3d at 286. The crime is too similar, the conviction too old, the testimony too important, and the credibility insufficiently material.

II. Under Rule 609(a)(2), the Prior Conviction Did Not Require Proving a Dishonest Act or False Statement

Rule 609(a)(2) further indicates that Mr. Davis's prior conviction is inadmissible, because 18 U.S.C. § 1361 does not require proving any dishonest act or false statement.

A. 18 U.S.C. § 1361 Does Not Explicitly Contain a Dishonest Act or False Statement nor is it Similar to a *Crimen Falsi*

"The proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit, or deception." *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992). Automatic admission of a prior conviction under Rule 609(a)(2) requires a court to determine that "establishing the elements of the crime required proving … a dishonest act or false statement." Fed. R. Evid. 609(a)(2). *See also*, *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992) (before the 2006 amendment, writing that "dishonesty or false statement is an element of the statutory offense."). A crime "must involve expressive dishonesty to be admissible under Rule 609(a)(2)." *Walker v. Horn*, 385 F.3d 321, 334 (3d Cir. 2004). Generally, Rule 609(a)(2) is interpreted narrowly, and meant to exclude potentially dishonest crimes such as theft that do not "bear on the witness's propensity to testify truthfully." *United States v. Johnson*, 388 F.3d 96, 100 (3d Cir. 2004) (citing to the Conference Committee).

The elements of 18 U.S.C. § 1361 are "(1) willfully injuring; (2) Government property." Neither willful injury, nor the requirement that the injured property belongs to the Government, require proving "a dishonest act or false statement." Fed. R. Evid. 609(a)(2). Therefore, Mr.

Davis's willful injury of Government property should not be covered by the statute. That Mr. Davis did so to steal mail from within the mailbox is immaterial. He was charged with theft in the indictment, although that count was ultimately dismissed in the plea deal—but an indictment is not a conviction under Rule 609. *See U.S. v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988). On the conviction alone, Mr. Davis only willfully injured Government property, circumstances aside, which has "little or no direct bearing on [his] honesty and veracity." *U.S. v. Estrada,* 430 F.3d 606, 617-18 (2d Cir. 2005).

Willful injury of Government property in this context is more akin to a crime of violence, which is not covered by 609(a)(2), than a crime of deceit. *But cf. U.S. v. Melaku*, 41 F.4th 386 (4th Cir. 2022) ("willfully injuring or committing depredation against property of United States was not "crime of violence," and thus could not serve as predicate to charge for using, carrying, and discharging firearm during crime of violence.). 18 U.S.C. § 1361 shares commonalities with a bevy of other non-deceitful crimes. *See*, *e.g.*, *U.S. v. Meserve*, 271 F.3d 314 (1st Cir. 2001) (assault and disorderly conduct). While destroying the mailbox with an automobile jack handle may indicate Mr. Davis has "a short temper" or "a combative nature," and his actions were certainly wrong, they have no bearing on his honesty. *Estrada*, 430 F.3d at 617-18.

CONCLUSION

Mr. Davis's prior conviction should be excluded under Fed. R. Evid. 609 if he elects to testify at trial. As shown above, under Rule 609(a)(1)(B), the probative value of admitting the prior conviction does not outweigh the prejudicial effect to Mr. Davis. The prior conviction is too similar to one of the alleged crimes, the conviction is too old to meaningfully impugn his credibility, his testimony is required to speak for various ambiguous unaccounted-for windows of time, and his credibility is not sufficiently at issue such that it is material to the case.

Secondly, under Rule 609(a)(2), Mr. Davis's prior conviction did not require proving a dishonest act or false statement, so should not be automatically introduced to the evidentiary record.

To: Aaron Colangelo

From: Benjamin Donvan

DATE: April 24, 2023

RE: River Testing Litigation

QUESTION PRESENTED[1]

Under the Clean Water Act, do land-based weapons, weapons ranges, and aircraft that fire ordnance directly into navigable waters constitute statutory point sources?

SHORT ANSWER

Probably yes. The land-based weapons, the weapons range, and aircraft that fire ordnance directly into navigable waters constitute point sources under the Clean Water Act because they are discernible, confined, and discrete conveyances that discharge pollutants directly into the waters of the United States. There is little question that the ordnance in the river came from these weapons and there is little doubt that they were directly conveyed by the agency targeting the waters. With respect to the weapons range itself, firing towards a set range of targets has been found several times to constitute a channeling equivalent to a conveyance.

FACTS

A federal agency has operated a weapons testing installation alongside a large river for over 100 years. While their operations have expanded beyond that narrow scope since then, they still maintain an active weapons testing range. Rather than targeting a land-based target, the weapons

[1] This writing sample was created as part of litigation I participated in during my time at NYU's Environmental Law Clinic, which placed me at NRDC. My supervisor made a few small comments on the first draft of the memorandum, but otherwise the writing reflects my own work. Further, I received permission to use this as a writing sample.

are targeted directly at the river, and shot into the river. The land-based weapons at the facility fire at targets on the river. The aircraft are piloted from the facility to above the water, where they shoot into the river from the skies. This memorandum assumes that the river is a water of the United States and that firing them constitutes a discharge under the Clean Water Act.

The range is covered by a Danger Zone in the Code of Federal Regulations, and the facility recently requested an expansion of the Danger Zone. This legal designation permits the agency to regularly close the river to traffic whenever they test their weapons. But the danger does not end after the firing stops. Up until 2007, the facility had been responsible for over 30 million pounds of projectiles fired at and into the river, and that volume has certainly increased in the ensuing years. Oystermen have complained to the local riverkeeper organization about finding weapon detritus and even unexploded ordnance in the area whenever they harvest the riverbed. There is no other means for the ordnance to have entered the water. They further worry that the degradation of submerged ordnance is introducing harmful chemicals into the river water, putting their oyster harvests at risk.

Many of the constituent chemicals in the ordnances are clearly dangerous. Some are explosive chemicals like ammonium pictrate, ethylbenzene, and RDX; others, toxic chemicals like lead. But many of the seemingly benign chemicals like phosphorus and aluminum may also present possible serious harm. For example, aquatic phosphorus contributes to algal bloom and aquatic aluminum is toxic to fish and invertebrates. Even iron and copper, the two most fired constituents at the testing range, have been linked to ecological harm in large quantities. This memorandum assumes that these are all pollutants under the Clean Water Act.

DISCUSSION

The Clean Water Act prohibits discharging pollutants through a point source into waters of the United States without an NPDES (or state analog) permit under the § 402 mandatory permitting requirement. "Except as in compliance with this section and section … [1342] … of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. We intend to sue the agency for discharging these pollutants into the river without a permit. A Clean Water Act plaintiff must show that (1) a pollutant was (2) added (3) to navigable waters (4) from (5) a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). This memorandum pertains specifically to the fifth point source element.

With these facts, we must show that the land-based weapons and the aircraft that fire weapons at and into the river constitute point sources under the Clean Water Act. A court would likely rule that such weapons and aircraft constitute point sources under the Clean Water Act.

The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts broadly construe this definition. *See U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.").

Courts have created tests for specific repeat categories of point sources, like stormwater runoff. *See, e.g.*, *Sierra Club v. Abston Construction, Inc.*, 630 F.2d 41 (5th Cir. 1989). But beyond a few broad tests used in certain circumstances and the mandate for broad construction, there is little guidance about specifically identifying point sources in other situations. *See*

generally Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Point Source" Element of the Clean Water Act Offense,* 45 Envtl. L. Rep. News & Analysis 11129 (2015). Few cases delve deeply into the question because the statute only requires an identifiable conveyance. *Id.* at 11139. And, as opposed to stormwater, in many other cases, a conveyance can be easily identified.

What is clear, however, is that this broad construction still requires being able to discern a specific source of pollution, as opposed to some unidentifiable point of discharge. *See, e.g.*, *Cnty. of Maui, Haw. v. Haw. Wildlife Fund,* 140 S.Ct. 1462 (2020); *cf. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) ("Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source."). The point source must "convey" the pollutant directly to navigable waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

Land-based weapons are point sources

Land-based mortars and weapons ranges constitute point sources under the Clean Water Act because they are "discernible, confined and discrete conveyances" that, in firing, discharge pollution into navigable waters.

Several cases support the proposition that, even without specifically targeting water, firing ranges can constitute point sources under the Clean Water Act. In *Stone v. Naperville Park Dist.*, the court found that a trap shooting range and the range's firing stations constituted point sources under the Clean Water Act. 38 F. Supp. 2d 651, 653 (N.D. Ill. 1999). Firing lead shot and shattering clay targets resulted in the discharge of clay and lead pollutants into a water

channel. *Id.* Specifically, the range itself constituted a "conveyance" under the Clean Water Act, because it "channel[ed] shooting by providing a facility at which individuals may shoot" and which results in clay and lead landing in water. *Id.* at 655. So, too, did each individual firing station. *Id.* An earlier unpublished case held similarly. A trap shooting range "is designed to concentrate shooting from a few specific points and systematically direct it in a single direction," and therefore "is an identifiable source from which spent shot and target fragments" were conveyed into navigable waters. *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of City of New York*, 1996 WL 131863, at *14 (S.D.N.Y. Mar. 22, 1996). A third, more recent shooting range case held at the motion to dismiss stage that a shooting range could plausibly constitute a point source because of its proximity to navigable water and because pollutants from weapons could be discharged into those waters and into manmade drainage channels. *Midshore Riverkeeper Conservancy, Inc. v. Franzoni*, 429 F. Supp. 3d 67, 80 (D. Md. 2019). Notably, another recent case refused to summarily recognize that a mortar shooting fireworks constituted a point source, because a firework's trajectory is unpredictable even when fired directly over a body of water. *Coastal Env't Rts. Found v. Naples Rest. Grp.,* --- F. Supp. 3d ---, 2022 WL 17578874, at *5 (C.D. Cal. Nov. 21, 2022). Importantly, though, this case can be distinguished because "defendants dispute[d] whether any fireworks-related debris landed" in the water at all. *Id.*

Nothing else could have directed the weapon debris and ordnance into the river. There is no ambiguity to it. The debris and ordnance came from the weapons fired from the facility. Further, the agency's land-based weapons and the shooting range constituted conveyances under the Clean Water Act by channeling shooting directly into the water, as in *Stone*. It was systematically directed in a single direction from a single identifiable source, per *Long Island*

Soundkeeper. That is, the shooting range shot at the water, and any weapon debris or unexploded ordnance in the river came only from a single identifiable source, the shooting range.

Finally, the only potentially adverse case is likely immaterial. *Coastal Env't Rts. Found.* has not yet reached trial, and merely suggests there could be a dispute of fact vis-à-vis a barge mortar's status as a point source, because there is a genuine dispute of material fact as to whether any pollutants actually entered the bay. In other words, the defendants may not have conveyed anything whatsoever. *Coastal* can also be further distinguished based on the nature of the discharge. Weapons and ordnance are similar to fireworks only in that they might be fired with gunpowder. The defendants in *Coastal* suggested that shooting fireworks fundamentally altered its constituent parts. *Coastal,* 2022 WL 17578874, at *5. Provided that the pleadings include the evidence of weapon debris and unexploded ordnance dredged along the riverbed, chemically unaltered, it is likely that these issues could be avoided entirely.

"The whole purpose of the facility is to 'discharge pollutants'" into navigable waters. *Stone*, at 655. The land-based mortars and weapons range are discernible sources, confined and discrete, that convey pollutants into navigable waters. For these reasons, the land-based weapons and the weapons range likely constitute point sources under the Clean Water Act.

Aircraft are point sources

The facility's helicopters and drones that fly above the river and shoot into it constitute point sources under the Clean Water Act because they are "discernible, confined and discrete conveyances" that, in firing, discharge pollution into navigable waters.

One case strongly supports the proposition that an aircraft's discharging weapons into navigable waters constitute a point source. Naval aircraft firing weapons into navigable waters around Puerto Rico were point sources under the Clean Water Act. *Romero-Barcelo v. Brown*,

478 F. Supp. 646, 664 (D.P.R. 1979), *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom. on other grounds Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). "It would be a strained construction of unambiguous language for the court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not '…any addition of any pollutant…from any point source…', particularly in view of the broad rather than narrow interpretation given to this type of statute." *Id.* at 664. Furthermore, it did not matter whether the aircraft intentionally targeted the water or whether they released ordnance unintentionally. *Id.* That said, while the court in *Romero-Barcelo* does rule these aircraft ordnance firings to be point source discharges, it does not offer an explanation beyond plain construction of the statute. That may not suffice, but there is another case tangentially on point. A court ruled that an airplane spraying pesticides over a region that included navigable waters constituted a point source. "An airplane fitted with tanks and mechanical spraying apparatus is a 'discrete conveyance.'" *Forsgren*, 309 F.3d at 1185. Another court has similarly held that a "spray apparatus … attached to trucks and helicopters" is a point source. *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188-89 (2d Cir. 2010).

Based on *Romero-Barcelo* alone, aircraft firing or even unintentionally releasing ordnance into navigable waters should constitute a point source. The agency's weapons-testing activities, then, very likely constitute point sources, too, as they pilot aircraft over navigable water and discharge ordnance and other weapons into the water. Under *Forsgren*, too, the aircraft are very likely point sources. An aircraft with a machine gun or bomb bay or other attachment is a discrete conveyance for the discharge of bullets or ordnance. In *Peconic*, however, the "spray apparatus" attached to a vehicle was the point source, rather than the vehicle itself. *Peconic* pertained to regular trucks and helicopters to which spraying devices were

attached, which presumably could be moved between different vehicles. The nature of the agency's aircraft is not certain, but it is possible that their fleet may contain both aircraft with integrated weaponry, and aircraft with modular or removable weaponry. This is likely a matter of semantics, and immaterial to successfully proving the point source element. Whether or not the weapons can be removed from the aircraft, the aircraft (or their weaponry) convey ordnance into navigable waters. They are singular sources for ordnance, and they are easily discernible whether or not they're a weapon that can be removed and reattached elsewhere. Ultimately, the ordnance was conveyed into the water because the aircraft flew above the water and shot into the water.

CONCLUSION

Based on these facts, the court will probably find that land-based weapons and aircraft that discharge ordnance into the river constitute point sources under the Clean Water Act because they are discernible, confined, and discrete conveyances that discharge pollutants directly into the waters of the United States.

Applicant Details

First Name	**Derek**
Last Name	**Faraldo**
Citizenship Status	**U. S. Citizen**
Email Address	**faraldo2021@lawnet.ucla.edu**
Address	**Address** **Street** **3842 S 63rd Dr** **City** **Phoenix** **State/Territory** **Arizona** **Zip** **85043** **Country** **United States**
Contact Phone Number	**6614065474**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**December 2015**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 21, 2021**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Chicano Latino Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UCLA Law 1L Moot Court Competition**

Bar Admission

Admission(s) **Arizona**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Derian, Steven
derian@law.ucla.edu
Shariff, Najah
Najah.Shariff@usdoj.gov
213-894-2534
Yeazell, Stephen
Yeazell@law.ucla.edu
(310) 825-8404

This applicant has certified that all data entered in this profile and any application documents are true and correct.

July 30, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to express my interest in a full-time law clerk position. Currently, I am a Phoenix resident, Assistant County Prosecutor, and a JAG officer in the U.S Army Reserves. As the grandson of Cuban and Mexican immigrants and the first in my family to attend law school I have great respect for the Judiciary and public service. My goal is to contribute a diverse perspective to the Judiciary and to inspire future generations of law students.

I am eager to combine my new legal skills with my previous education and work experience. Prior to law school, I forged strong writing abilities as a graduate student, where I wrote several analytical papers, including my master's thesis at UNLV. I further developed the skills to write quickly and clearly during my summer externships at the U.S. Attorney's Office and at Alverson Taylor & Sanders, where I learned to translate complex matters into digestible memoranda under tight deadline constraints.

While writing and research are important, the interpersonal skills I developed through my experience as a 3rd grade teacher in Las Vegas' Teach for America program have been invaluable. I learned to develop a rapport with a diverse array of students and co-workers and to effectively mediate disputes. I choose to become a teacher because I am passionate about giving back to the community and I hope to continue this personal mission as a judicial law clerk by learning how judges weigh strict application of the law with other notions of justice and fairness.

My current position as a county prosecutor is teaching me valuable trial advocacy skills and I am being exposed to a variety of areas of law as a JAG Officer. However, I want to continue to improve my legal research and writing skills because I hope to become a U.S. Attorney someday. I am prepared to take a leave of absence from my primary civilian job to dedicate myself to serving as a judicial law clerk and seek a mentor who will help me improve as a lawyer and leader.

In sum, I believe that with these tools, I will be an asset to the Judiciary. Please find enclosed my resume and supporting documents for review. I welcome the opportunity to interview, and please let me know if anything else will be needed from me. Thank you for your time and consideration.

Sincerely,

Derek Faraldo
UCLA Law School ('21)

Derek Faraldo

15 W Geneva Dr, Tempe AZ 85282 • faraldo2021@lawnet.ucla.edu • 661.406.5474

EDUCATION

University of California Los Angeles School of Law (UCLA), Los Angeles, CA
Juris Doctor, May 2021
GPA: 3.50
Activities: Federalist Society, *Member*; Chicano-Latino Law Review, *Staff Editor*; OutLaw (LGBTQ+), *Member*

University of Nevada Las Vegas (UNLV), Las Vegas, NV
Master of Education in Curriculum and Instruction, May 2018
GPA: 4.00
Activities: Graduate Student Association, *Officer;* UNLV-Three Square Food Pantry Partnership, *Volunteer Coordinator*

Georgetown University (GU), Washington D.C.
Bachelor of Science, *cum laude*, (School of Foreign Service) International Politics, December 2015
GPA: 3.55
Activities: GU College Republicans, *Vice President*; Spanish Society, *Outreach Coordinator*

EXPERIENCE

United States Army Reserves, Fort Huachuca, AZ
Judge Advocate General (JAG) 1st Lieutenant April 2022 – Present

- Graduated top of my class from the Judge Advocate General's School, earned the Distinguished Graduate Award, and American Bar Association Award for Professional Merit.
- Advising soldiers and commanders on legal issues ranging from criminal, family, trusts & estates, employment, administrative and contract matters.
- Lead a unit of paralegals and administrative staff to complete assigned legal and operational tasks.

Maricopa County Attorney's Office, Phoenix, AZ
Deputy County Attorney August 2021 – Present

- Prosecute misdemeanor cases and prepare discovery requests, interview witnesses, and negotiate plea agreements.
- Draft pre-trial motions, conduct legal research, and argue motions in court.
- Achieved guilty verdicts in multiple bench trials including cases involving complex expert testimony.

Alverson Taylor & Sanders, Las Vegas, NV
Summer Associate June 2020 – July 2020

- Conducted legal research for the Litigation and Medical Malpractice Groups.
- Drafted legal motions and memoranda, including Motion In Limine and discovery requests and responses.

U.S. Attorney's Office, Los Angeles, CA
Legal Extern, Tax & Bankruptcy Division May 2019 – August 2019

- Assisted AUSAs with legal research, writing pleadings, trial preparation, and completing appellate briefs.
- Observed trials and other court proceedings and assisted AUSAs with logistical matters.

Teach for America Corps, Las Vegas, NV
Elementary School Teacher (*3rd Grade)* May 2016 – May 2018

- Committed two years to teach at an under-resourced public school and established an ongoing coding program.
- Advocated for students on school behavioral committee who were in danger of receiving suspensions or expulsions.

SCHOLASTIC EXPERIENCE

Universidad de Costa Rica (Environmental Policy Institute), San José, Costa Rica
Georgetown Policy Fellow July 2014 – December 2014

- Presented research findings regarding rain forest preservation and NGO accountability at an academic conference.

Chicano Latino Youth Leadership Project (CLYLP), Sacramento, CA
California Assembly Fellow May 2015 – August 2015

- Received a prestigious scholarship to work for a California State Legislator for three months as a staff member.

SKILLS, PUBLICATIONS & INTERESTS

Language: Spanish: Professional Conversational Fluency (Certified by Georgetown's School of Foreign Service)
Interests: Baseball, Karate (black belt), Star Wars, Snowboarding, Traveling, and Real Estate

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	FARALDO, DEREK A
UCLA ID:	804720803
Date of Birth:	09/10/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 07, 2021 | 06:34:32 PM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/20/2018

SCHOOL OF LAW

Major:
LAW

Degrees | Certificates Awarded

None Awarded

Previous Degrees

None Reported

California Residence Status

Nonresident

Fall Semester 2018

Major:
LAW

CONTRACTS	LAW 100		4.0	12.0	B
INTRO LEGL ANALYSIS	LAW 101		1.0	0.0	P
LGL RSRCH & WRITING	LAW 108A		2.0	0.0	IP
Multiple Term - In Progress					
TORTS	LAW 140		4.0	13.2	B+
CIVIL PROCEDURE	LAW 145		4.0	16.0	A
LAWYR-CLIENT RELATN	LAW 155		1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	41.2	3.433

Spring Semester 2019

LGL RSRCH & WRITING	LAW 108B		5.0	16.5	B+
End of Multiple Term Course					
CRIMINAL LAW	LAW 120		4.0	12.0	B
PROPERTY	LAW 130		4.0	13.2	B+
CONSTITUT LAW I	LAW 148		4.0	13.2	B+
AMER LEGAL THOUGHT	LAW 165		1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	54.9	3.229

Fall Semester 2019

EVIDENCE	LAW 211		4.0	13.2	B+
ACCNTNG FOR LAWYERS	LAW 234		2.0	6.0	B
THE LAW & YOUR LIFE	LAW 427		1.0	0.0	P
COMP EDUC LAW & POL	LAW 671		3.0	12.0	A
SIM CIV TRIAL ADV	LAW 705		4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	31.2	3.467

Spring Semester 2020

CONSTITUTN CRIM PRO	LAW 202	4.0	0.0	P
DIGITL TECH CON LAW	LAW 386	2.0	0.0	P
PART-TIME EXTERNSHP	LAW 801	6.0	0.0	P
EXTN SEMINAR: CRIM	LAW 805	1.0	4.0	A
HIGHER ED: LW&PLCY	LAW 965	2.0	8.0	A

SPRING 2020: DUE TO COVID-19, THE SCHOOL ADOPTED MANDATORY P/U/NC GRADING WITH EXCEPTIONS FOR CERTAIN CATEGORIES OF CLASSES AND STUDENTS.

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	12.0	4.000

Fall Semester 2020

WILLS AND TRUSTS	LAW 205	4.0	16.0	A
PROFESSIONAL RESPON	LAW 312	3.0	0.0	P
NONCITZN CRIM SYS	LAW 603	3.0	12.0	A
INSURNC FOR LITIGTR	LAW 757	3.0	11.1	A-

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	39.1	3.910

Spring Semester 2021

BUSINESS ASSOCIATNS	LAW 230	4.0	0.0	P
SPEC TPCS: FAM LAW	LAW 617	3.0	12.0	A
ADV CRIM TRIAL ADV	LAW 789	4.0	0.0	P
NEGOTIATION THEORY	LAW 972	3.0	9.9	B+

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	21.9	3.650

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	31.0	31.0	N/a	N/a
Graded Total	57.0	57.0	N/a	N/a
Cumulative Total	88.0	88.0	200.3	3.514

Total Completed Units 88.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

Derek Faraldo
Georgetown University
Cumulative GPA: 3.551

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Econ Principles Macro		B+	3	
Intermediate Spanish I		B-	3	
Latin America I		B+	3	
Political and Social Thought		B+	4	
SFS Proseminar		A-	3	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Econ Principles Micro		A-	3	
Ethics International Law		A-	3	
Intermediate Spanish II		B	3	
International Relations		A-	3	
Map of the Modern World		S	1	
The Problem of God		B+	3	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Spanish I		B+	3	
Comparative Political Systems		A	3	
International Finance		B	3	
Public Policy Internship and Seminar		A-	4	
Quantitative Methods		A-	3	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Spanish II		A-	3	
Beginning Logic		A	3	
Ethics and International Relations		A	3	
International Trade		B+	3	
Latin America II		B+	3	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Democracy and Human Rights	8.5	3
History of the Institutions of Costa Rica	9	3
Latin America: Evolution of Political Ideas	7	3
Political Georgraphy	9.5	3
Psychology 101	9	

Study Abroad in Costa Rica. Numerical Grading System. All classes in Spanish.

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
International Law		A-	3	
Intro to Strategic Thought		A-	3	
Modernization and Development		A	3	
Terrorism, Community and Discourse		A-	3	
U.S.-Latin American Relations		A-	3	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Ethical Issue International Relations		B+	3	
Holocaust by Bullets		A-	3	
Spain Literature and Culture		A	3	
Topic: Cuba The U.S. and the World		A-	3	

Derek Faraldo
University of Nevada Las Vegas
Cumulative GPA: 4.00

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Assessment in Literacy		A	3	
Literacy Instruction I		A	3	
Multicultural Education		A	3	
Parent Involvement Special Education		A	3	
TESL Methods and Materials		A	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Teaching Elementary School Math		A	3	
Teaching Elementary School Science		A	3	

Summer 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Special Education and Legal Issues		A	3	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Continuing Literature for Children and Young Adults		A	3	
Elementary Education Curriculum		A	3	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Culminating Experience		S	1	
Teachers as Action Researchers		A	3	
Teaching Elementary School Social Studies		A	3	

UCLA School of Law

STEVEN K. DERIAN
LECTURER IN LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 825-1440
Email: derian@law.ucla.edu

June 16, 2022

Re: Recommendation for Derek Faraldo

Dear Judge:

I write to recommend Derek Faraldo who has applied for a clerkship in your chambers. I recommend Derek highly. I firmly believe that he will be an excellent judicial clerk.

During his third semester of law school here at UCLA, Derek was a student in my trial advocacy class. The class was comprised of only sixteen students, so I became well-acquainted with each of the students. Even among the talented group of students I had in that class, Derek stood out. He was very enthusiastic and was eager to improve his advocacy skills. For example, on the first day of the semester he volunteered to be the first to conduct a direct examination exercise in front of the class. He is a quietly confident person, and he was an outstanding performer in the class from the very first day.

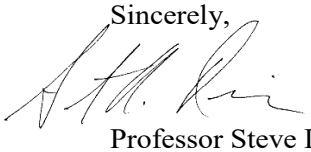
He and the other students performed various exercises--opening statements, witness examinations, and closing arguments--designed to prepare them for trial work. Derek was always extremely well prepared, and I could count on him to give an exemplary performance. He is articulate, thinks well on his feet, and is very quick on the uptake. He also worked well with other students.

Derek is a self-motivated person. He would often take time outside of class to ask questions about upcoming exercises and about his performance on previously performed exercises. He was also very consistent in reviewing the videos of his performances outside of class time. He genuinely wanted to continue to improve throughout the semester. He is a hard worker, and he is enthusiastic about being a trial lawyer--and that's one reason he has applied for a clerkship in your chambers.

Derek is also a good writer. He wrote various assignments for me, including case work-ups of two of the files we worked on during the semester. His writing in those case analyses was clear and concise and demonstrated his excellent analytical skills. Since graduating from UCLAW, Derek's work experience has more fully prepared him for the work he'll do for you.

Derek' performance in my class was excellent, and I'm sure that he'll perform well in your chambers. His enthusiasm for the work will motivate him; he embraces doing hard and thorough work. I recommend Derek highly, and I believe that he will be an excellent clerk.

Sincerely,



Professor Steve Derian
UCLA School of Law, Clinical Program

United States Department of Justice

United States Attorney's Office
Central District of California

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Los Angeles, CA 90012

October 1, 2020

Re: *Derek Faraldo*
Recommendation

To Whom It May Concern:

I am writing this letter in support of Derek Faraldo's application for a clerkship in your chambers. I had the privilege of working directly with Mr. Faraldo as my extern in the Tax Division of the United States Attorney's Office in Los Angeles during the summer of 2019. Mr. Faraldo demonstrated sophisticated analytical skills combined with refined personal communication ability.

Mr. Faraldo has excellent legal research and analytical skills. Mr. Faraldo was often asked to do research on a wide range of complex issues. During the summer of 2019, Mr. Faraldo did legal research on technical tax issues, bankruptcy issues, federal civil procedure issues, and Report of Foreign Bank and Financial Accounts (FBAR) issues, including the following: 1) what is the "willfulness" standard of the FBAR penalty arising under 31 U.S.C. § 5314; 2) what is the standard of review in district court on issues involving a taxpayer's failure to meet reporting requirements applicable to foreign bank accounts; 3) whether a debtor's homestead exemption claim under Section 522 of the Bankruptcy Code is effective against the federal tax lien; 4) whether a creditor's security interest meets the requirements under Section 6323(h)(1) of the Internal Revenue Code giving this creditor lien priority over the IRS's federal tax lien; and 5) what impact does an irrevocable trust have on a primary residence for purposes of calculating insolvency under Section 108(a)(1)(B) of the Internal Revenue Code.

Mr. Faraldo's legal writing is outstanding. His legal analysis of the controlling law was thoughtful and thorough. Often, I would give him a complex set of facts involving various legal issues. He was able to process all of the information very quickly and identify the legal and factual issues effortlessly. Mr. Faraldo synthesized large amounts of information effectively in his writing. Mr. Faraldo's writing style was well organized in a digestible format. Mr. Faraldo was very skilled with legal citations. In fact, I relied on Mr. Faraldo to review my briefs to ensure that the citations were in the proper format.

Mr. Faraldo's work ethic is extraordinary. Mr. Faraldo was focused and hard working. Mr. Faraldo was a self-starter and always got the job done. Mr. Faraldo was able to work competently and quickly. Mr. Faraldo has effective time management skills, as he also worked for at least two other Assistant United States Attorneys in my office and each reported he did first-rate work.

I wholeheartedly recommend Mr. Faraldo for a clerkship position in your chambers. Mr. Faraldo is easily one of the best externs whom I have worked with in the nearly six years that I have been in this office. His eagerness to work and learn is equally matched with his superior research and writing skills. I am confident that this exceptional young man will greatly contribute to the quality of work produced by your chambers.

I welcome the opportunity to further discuss Mr. Faraldo's qualifications. Please feel free to have your staff call me if you have further questions.

Respectfully,

NICOLA T. HANNA
United States Attorney

Najah J. Shariff
Assistant United States Attorney

UCLA School of Law

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September 30, 2020

Dear Judge:

I write to recommend Derek Faraldo for a clerkship in your chambers; I am happy to do so, for on the basis of my encounters with him, Derek is a strong student and will be a fine clerk.

I know him from my first year civil procedure in which he earned an excellent grade—an A. And I know he earned that A while facing some difficult personal challenges which he shared with me—challenges that have happily entirely resolved themselves but which were weighing heavily on his mind during the semester. Knowing of those challenges led me to admire Derek's maturity and resilience as well as his intellectual powers. He is an articulate and sensitive young man, who has seen a good deal more of life than I had at his age and has benefitted from it in many ways.

I think Derek would be a pleasure to have in chambers—a cheerful and diligent presence, not too full of himself, hard-working, with enough experience in life to understand the world somewhat better than the average first year law student. I highly recommend him and would be happy to answer questions or supply further details.

Sincerely,

Stephen C. Yeazell

Stephen C. Yeazell

Derek Faraldo
12042 Rialto Street, Sun Valley, CA 91352 • faraldo2021@lawnet.ucla.edu • 661.406.5474

WRITING SAMPLE

This writing sample is a memorandum of points and authorities in support of defendant's motion for summary adjudication. This case is based on fictitious information provided by my professor. The action took place in Los Angeles, California and plaintiff is suing defendant in state court, alleging that constructive discharge occurred, and plaintiff was forced to resign his position at defendant's place of business. I was assigned to represent the defendant, Lit Enterprises, and submit a motion for summary adjudication.

I. INTRODUCTION

Plaintiff Ernie Pantusso ("Pantusso") announced his resignation from his bartending position despite Defendant Lit Enterprises' ("Lit") best efforts to retain Pantusso. When Lit originally purchased a bar called Liquid Investments, Lit asked Pantusso, who was already an experienced bartender and familiar with Liquid Investments, to continue working and help train new staff members. Unfortunately, Pantusso was not the best mentor and often clashed with the new staff due to his sarcasm and disrespectful behavior. Management warned Pantusso about his behavior on multiple occasions and offered to move him to a different location where he could have a fresh start. However, even with a change of scenery Pantusso continued to mock his new supervisor and harass customers. Despite Pantusso's inappropriate behavior, Lit continued to accommodate him. Yet, On May 5, 2017, Pantusso arrived late to work, yelled at his colleagues, said he was quitting his job, and stormed out of the bar.

Pantusso subsequently brought this unsubstantiated constructive discharge claim even though Lit could not have realized Pantusso felt coerced into resigning. First, Pantusso failed to formally notify Lit of a pattern of adverse working conditions because he failed to file any formal complaints or document any problems he had. Next, the working conditions Pantusso alleges were intolerable were routine business decisions, standard disciplinary procedures, and an uncollegial atmosphere that Pantusso created himself because of his uncooperative and inappropriate behavior at work. As a result, Pantusso cannot demonstrate either formal notification or that intolerable working conditions even existed. Thus, Pantusso is acting unreasonably when he claims he felt coerced into resigning his position. Therefore, because Pantusso cannot show that a constructive discharge occurred then Lit's motion for summary adjudication should be granted as a matter of law.

II. STATEMENT OF FACTS

On May 5, 2017, Pantusso announced the resignation of his bartender position. (Pantusso Dep., 5:20-21.) Lit was surprised that Pantusso would quit because Pantusso never filed any formal complaints with management about his working conditions and Pantusso made himself known to everyone as a non-complainer. (Pantusso Dep., 6:29-30.)

After acquiring a bar called Liquid Investments, Lit retained Pantusso as an experienced bartender to help train new hires and to provide a smooth transition. (Howe Dep., 3:30-33.) However, Pantusso became increasingly combative with customers, colleagues, and management. (Howe Dep., Ex. 1.) On one occasion Pantusso grabbed a customer's arm and intimidated a customer into giving him a tip. (Howe Dep., 4:40-43.) Another incident occurred when Pantusso yelled at his supervisor, Sam Malone, and disrespectfully referred to him as "kid" in front of other staff. (Howe Dep., 4:30-31.) Despite Pantusso's unprofessional and inappropriate behavior, Lit retained Pantusso and offered him a fresh start at another bar owned by Lit, called Tilt, when economic conditions deteriorated back at Liquid Investments. (Howe Dep., 5:37-38.)

Pantusso continued to display a bad attitude at Tilt by acting rudely towards customers and his supervisor. (Howe Dep., 8:21-23.) For example, Pantusso disrespected his new supervisor, Woody Boyd, by referring to him as "kid" with a sarcastic tone that embarrassed Woody in front of the staff. (Howe Dep., 9:5-8.) As a result of Pantusso's inappropriate behavior, Pantusso received one negative performance review and two formal write-ups as part of Lit's standard disciplinary procedures that applied equally to all staff. (Howe Dep., Ex. 1.; Ex. 3.; and Ex. 4.) Pantusso's colleagues and supervisors had to tolerate Pantusso's unprofessional attitude and on one occasion he upset an employee who made an inappropriate comment back at Pantusso, which Pantusso immediately laughed off in a sarcastic manner. (Howe Dep., 8:39-40.) Furthermore, Pantusso never filed a formal complaint about inappropriate comments or their impact on him to management. (Pantusso Dep., 6:29-30.)

Economic conditions forced business decisions that affected how Lit operated at Liquid Assets and Tilt, such as cutting back on hours for all bartenders at Liquid Assets to make sure

everyone would keep their jobs. (Howe Dep., 4:8-9.) Over at Tilt, some of the busiest times were during the day, so Pantusso was scheduled for those shifts. (Howe Dep., 4:39-40.) Pantusso received the same hourly pay rate plus tips at Tilt as he did at Liquid Assets. (Howe Dep., 6:33-34.) There was no designated or free parking at Tilt due to the layout of the property, which meant all staff were responsible for their own parking. (Howe Dep., 10:19-20.) Furthermore, Tilt is a "barcade", so there are arcade game machines that all bartenders must assist with collecting quarters from and all bartenders must help with writing down the winners of competitions on a scoreboard. (Howe Dep., 7:20-21; 7:39-40.) Pantusso mentioned he occasionally had a sore back from completing these tasks, but he never submitted a doctor's note or filed a formal complaint about any of his working conditions. (Howe Dep., 7:26-27.) All bartenders had to do equal tasks, so Pantusso was treated the same as everyone else before leaving his job. (Howe Dep., 13:15-16.)

Despite Lit's best efforts to retain Pantusso, he voluntarily resigned on May 5, 2017, after he showed up to work late, yelled at the staff, and left the building. (Howe Dep., 11:11-20.) As a result, Lit was surprised about this lawsuit because Pantusso decided on his own to quit and Pantusso always had the option to stay and keep his job. (Howe Dep., 12:37-38.)

III. SUMMARY ADJUDICATION SHOULD BE GRANTED BECAUSE PANTUSSO'S CONSTRUCTIVE DISCHARGE CLAIM HAS NO MERIT SINCE PANTUSSO CANNOT DEMONSTRATE ISSUE OF MATERIAL FACT FOR EACH ELEMENT, SO LIT IS ENTITLED TO SUMMARY ADJUDICATION AS A MATTER OF LAW

Summary adjudication is proper when one or more causes of action within a lawsuit has no merit because the plaintiff cannot prove every element of a particular action. Paramount Petroleum Corp. v. Super. Ct., 227 Cal. App. 4th 226, 239 (2014). Pantusso has brought causes of action for constructive discharge, breach of contract, breach of implied covenant, and age discrimination. However, Pantusso's constructive discharge action has no merit because Pantusso cannot meet his burden of demonstrating issue of material fact for all the elements. Holmes v. Petrovich Dev. Co., LLC, 191 Cal. App. 4th 1047, 1062 (2011) (reaffirming defendant's summary adjudication motion when plaintiff could not show issue of material fact

for all the elements of constructive discharge). As a result, Lit's summary adjudication motion should be granted as a matter of law. Should Lit's motion be granted, then Pantusso's claims for breach of contract and breach of implied covenant are also defeated as a matter of law.

IV. THE UNDISPUTED FACTS SHOW THAT IT WAS UNREASONABLE FOR PANTUSSO TO FEEL COERCED INTO RESIGNING BECAUSE LIT DID NOT INTENTIONALLY CREATE OR KNOWINGLY PERMIT UNUSUALLY AGGRAVATED OR INTOLERABLE WORKING CONDITIONS

In order to establish constructive discharge, a plaintiff must prove the following: (1) the employer either intentionally created or knowingly permitted ("intent or knowledge element"); (2) adverse working conditions that were so unusually aggravated or intolerable that the employee felt coerced to resign ("coercion element"). Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1251 (1994) (*overruled on other grounds by* Jie v. Liang Tai Knitwear Co., 89 Cal. App. 4th 654 (2001)). Essentially, the employers conduct must effectively force an employee to resign. Turner, 7 Cal. 4th at 1251.

A. OCCASIONAL INFORMAL COMPLAINTS DO NOT ESTABLISH THAT PANTUSSO MADE A CONSISTENT EFFORT TO FORMALLY NOTIFY LIT OF UNUSUALLY AGGRAVATED OR INTOLERABLE WORKING CONDITIONS

A plaintiff fails to establish the intent or knowledge element when the employer is not formally notified of unusually aggravated or intolerable working conditions and the impact of the conditions on the employee. Gibson v. ARO Corp., 32 Cal. App. 4th 1628, 1638 (1995) (holding employer was never formally notified of intolerable working conditions or their impact on the plaintiff when plaintiff failed to file a formal complaint and clearly explain to management that his working conditions were intolerable); Scotch v. Art Inst. of Cal., 173 Cal. App. 4th 986, 1023 (2009).

Like Gibson, Pantusso never filed a formal complaint about any of his working conditions with management. Pantusso did not verify his car troubles by presenting parking

tickets or gas and repair bills that could have put Lit on notice about possible adverse working conditions. Pantusso also failed to demonstrate how a single inappropriate comment made by another employee impacted him since he never filed a formal complaint. Additionally, Pantusso prided himself on being a non-complainer and a sarcastic man who liked to call other people names, so Lit could not infer just from occasional informal complaints without formal documentation and a clear explanation that Pantusso's working conditions were intolerable. Therefore, like the employer in Gibson, Lit was never formally notified of unusually aggravated or intolerable working conditions and their impact on Pantusso, so he fails to establish the intent or knowledge element.

In Scotch, plaintiff scheduled a meeting with his employer's human resources office to disclose in a confidential setting that he had HIV. Scotch, 173 Cal. App. 4th at 1008. Plaintiff's employer then implemented a mandate for employees to obtain a master's degree. Id. at 998. However, plaintiff failed to file a formal complaint or clearly explain that his HIV status made obtaining a master's degree an intolerable working condition. Id. Subsequently, plaintiff received a low performance review and his pay was reduced. Id. at 1001. Plaintiff alleged discrimination and constructive discharge, but plaintiff's HIV status was kept confidential as requested and not used in the decision to reduce his work status and lower his pay. Id. As a result, the employer was unaware of any specific health concerns that would have impacted plaintiff's working conditions, which included the inability to obtain a master's degree. Id. Therefore, the employer was never formally notified of unusually aggravated or intolerable working conditions, so plaintiff failed to establish the intent or knowledge element. Id. at 1023.

Pantusso never scheduled a formal meeting with management and he never filed a formal complaint about his sore back. As a result, Lit had less formal notice than the employer in Scotch. Furthermore, Pantusso failed to submit documents such as a doctor's note to notify Lit

how certain job assignments were supposedly hurting his back. Yet, Lit still attempted to remedy the situation despite Pantusso's negative performance review and multiple write-ups. Lit forgave Pantusso's inappropriate behavior and maintained his employment status by offering him the same hourly pay rate, unlike the employer in Scotch. Thus, Lit was more supportive than the employer in Scotch and willing to accommodate Pantusso's health concerns, but Lit was never formally notified of unusually aggravated or intolerable working conditions, so Pantusso fails to establish the intent or knowledge element.

B. ROUTINE BUSINESS DECISIONS, STANDARD DISCIPLINARY PROCEDURES, AND UNCOLLEGIAL OR ALLEGED DISCRIMINATION, DO NOT FORM A CONTINUOUS PATTERN OF UNUSUALLY AGGRAVATED OR INTOLERABLE WORKING CONDITIONS

A plaintiff cannot establish the coercion element when similarly positioned employees are treated equally and there is no continuous pattern of extreme hardship for the plaintiff. Simers v. Los Angeles Times Commc'ns, 18 Cal. App. 5th 1248, 1270 (2018); Cloud v. Casey, 76 Cal. App. 4th 895, 903 (1999) (holding denial of a promotion, feeling discriminated against, not liking certain job assignments, and a few inappropriate comments were not intolerable working conditions); Turner, 7 Cal. 4th at 1247 (holding an involuntary transfer, reduction in pay, and working around illegal activity were not intolerable working conditions). Intolerable working conditions are not determined by the employee's feelings towards them but objectively by the working conditions themselves. Id.

1. BUSINESS DECISIONS DO NOT CONSTITUTE UNUSUALLY AGGRAVATED OR INTOLERABLE WORKING CONDITIONS

Like the plaintiff in Turner, Lit transferred Pantusso, but he voluntarily chose to accept the transfer instead of staying at Liquid Investments. Pantusso was disrespecting his supervisor and harassing customers at Liquid Investments, so Lit felt the right business decision would be to offer Pantusso a fresh start at Tilt. Additionally, Lit was more generous than the employer in

Turner by maintaining Pantusso's same hourly pay rate at Tilt. Economic conditions determined exact weekly pay but Lit scheduled Pantusso for the busy daytime hours at Tilt so he could also get larger tips. Finally, Lit's business decisions determined that all the bartenders at Tilt were equally responsible for their own parking and completing other job assignments unique to Tilt like collecting quarters from the videogame machines and writing down the winners of competitions on a scoreboard. All these business decisions led to more equal treatment than the business decisions that led to the involuntary transfer, reduction in pay, and illegal activities in Turner that were not deemed intolerable working conditions. Thus, Pantusso fails to demonstrate that Lit's business decisions unequally targeted him and formed a continuous pattern of extreme hardship for Pantusso. As a result, Pantusso fails to establish the coercion element.

2. STANDARD DISCIPLINARY PROCEDURES DO NOT ESTABLISH A PATTERN OF UNUSUALLY AGGRAVATED OR INTOLERABLE WORKING CONDITIONS

In Simers, plaintiff was subject to an internal investigation for alleged misbehavior relating to his conduct at work. Simers 18 Cal App. 5th at 1270. Plaintiff then received negative performance evaluations and a demotion, along with reduced pay as part of the employer's standard disciplinary procedures that applied equally to all employees. Id. at 1271. Plaintiff's supervisors also told him he was an embarrassment, did sloppy work, and threatened to terminate him. Id. However, standard disciplinary procedures including negative performance evaluations, occasional harsh or unfair criticism of an employee's job performance, or threats of termination are not considered unusually aggravated or intolerable working conditions. Id. at 1272. Because plaintiff cannot show that his employer's standard disciplinary procedures were unusually aggravated when applied to him and formed a continuous pattern of extreme hardship, the plaintiff failed to establish the coercion element. Id. at 1274.

Like Simers, Pantusso's behavior was not up to Lit's professional standards. For example, Pantusso harassed customers and acted rudely towards some of them. Pantusso also repeatedly referred to his supervisors as "kid" and disrespected them in front of staff. As a result, Pantusso received one negative performance review and two formal write-ups. However, unlike the plaintiff in Simers, Pantusso never received a demotion or reduced pay because of his unprofessional behavior. Any criticism about Pantusso's behavior at work was intended to help Pantusso work more cooperatively with the rest of the staff. All the remedial actions Lit took were reasonable standard disciplinary procedures that applied equally to all bartenders. Hence, Lit's standard disciplinary procedures were neither unusually aggravated when applied to Pantusso nor formed a continuous pattern of extreme hardship for him. Therefore, Pantusso failed to establish the coercion element.

3. PANTUSSO'S UNCOLLEGIAL AND ALLEGED DISCRIMINATORY WORKING CONDITIONS WERE NOT UNUSUALLY AGGRAVATED OR INTOLERABLE

Like the plaintiff in Cloud**,** Pantusso felt there was an uncollegial environment and that he was being discriminated against. However, like Cloud, Pantusso's working conditions must be judged independently from his feelings. Therefore, looking only at the working conditions themselves, Pantusso was never denied a promotion like the plaintiff in Cloud and Pantusso had to complete the same tasks as all the other bartenders. Pantusso also dealt with fewer inappropriate comments than the plaintiff in Cloud. In fact, Pantusso laughed off the one inappropriate comment made about him and he never filed a formal complaint. Conversely, Pantusso indulged in name calling and mocking his supervisors, colleagues, and customers. As a result, Lit had to help Pantusso repair his relationship with the staff. Therefore, one inappropriate comment caused by the uncollegial environment that Pantusso created himself,

does not show he was treated unequally or form a continuous pattern of extreme hardship. Thus, Patusso fails to meet the coercion element.

Because Pantusso cannot meet his burden of demonstrating issue of material fact for both the intent or knowledge element and the coercion element, Lit's motion for summary adjudication should be granted.

V. CONCLUSION

For the foregoing reasons, Lit respectfully requests that this Court grant Lit's motion for summary adjudication.

DATED: March 21, 2021 Norm Peterson
Attorney for Defendant, LIT ENTERPRISES

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IN THE DOWNTOWN JUSTICE COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. EVGUENIA BALANDOVA, Defendant.	Case No: TR2021-123088 ***STATES RESPONSE TO DEFENDANTS MOTION TO DISMISS RE: DENIAL OF EXCULPATORY EVIDENCE*** (Assigned to the Honorable Enrique Medina)

The State of Arizona, by and through undersigned counsel, hereby responds to the Defendants Motion to Dismiss Re: Right to Counsel and respectfully asks that the Court deny the Motion.

Submitted December 8, 2021.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

BY:
/s/ Derek Faraldo
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On June 20, 2021, at approximately 10:15pm, Trooper B. Kauffman #10756 arrived on scene of a two vehicle non-injury collision Westbound Interstate 10 (I-10) milepost 145 to assist Trooper B. Kudler #7466. Evguenia Balandova, the Defendant, was involved in the collision and was later placed under arrest for driving under the influence of alcohol.

When Trooper Kudler arrived at the scene and first spoke with the defendant, he noticed the defendant had watery eyes, slurred speech, and smelled a light odor of alcoholic beverage emitting from her breath. Trooper Kudler performed the Horizontal Gaze Nystagmus test (HGN) on the defendant and observed 6 out of 6 clues. Trooper Kauffman then took the defendant off the highway and once at a safe location he asked her to step out of his patrol vehicle to conduct more field sobriety tests (FSTs). The defendant claimed she was speaking with an attorney at the time and Trooper Kauffman had to repeatedly ask the defendant to hang up the phone.

The defendant agreed to perform the FSTs and was subsequently arrested and read her Miranda rights. Once at the station, Trooper Kauffman read the defendant the Admin Per Se Affidavit and Implied consent form which the defendant refused to sign and denied testing.

At 11:29pm the Defendant was given a 15-minute period to consult her attorney on the phone. At 11:52pm Trooper Kauffman received a search warrant to test the defendant's blood, but the defendant agreed to do the breath test (intoxilyzer). The breath test was